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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-107

PETER PREISER, Commissioner of Correctional Services of New York State, and HAROLD BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

against

JAMES NEWKIRK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, Peter Preiser, the Commissioner of Correctional Services of the State of New York, and Harold Butler, the Superintendent of Wallkill Correctional Facility, pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit in the case of *Newkirk* v. *Butler*, which was decided on June 3, 1974.

Opinions Below

The decision of the Court of Appeals which petitioners seek to review is not yet reported. It is reproduced as appendix A. The final judgment of the District Court,

dated October 26, 1973, which was affirmed in part and modified in part by the Court of Appeals, is reproduced as appendix B. The opinion of the District Court, dated October 9, 1973, is reported at 364 F. Supp. 497, and is reproduced as appendix C. The decision of the District Court, dated July 31, 1972, denying respondent Newkirk's motion for a preliminary injunction, is not reported, and is reproduced as appendix D.

Jurisdiction

The decision of the Court of Appeals was handed down on June 3, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Question Presented

Whether a prison inmate who is transferred within a state from a medium security institution to a maximum security institution, without the imposition of disciplinary punishment, is entitled under the Due Process Clause of the Fourteenth Amendment to notice of the reasons for the transfer and an opportunity to be heard?

Statement of the Case

A. Prior Proceedings

This action was commenced by respondent Newkirk and three other New York State prison inmates in July, 1972 in the United States District Court for the Southern District of New York. Newkirk and his co-plaintiffs complained that they had been transferred from Wallkill Correctional Facility, a medium security institution to various maximum security facilities throughout the state, in violation of their rights under the Constitution and under 42 U.S.C. § 1983. Newkirk and his co-plaintiffs sought a preliminary injunction from the District Court, directing their return to Wallkill and preventing petitioners from transferring them in the future without due process procedures.

On July 31, 1972, the District Court denied the motion for a preliminary injunction. The Court held that to grant Newkirk and his co-plaintiffs the relief they sought, would be to grant them everything they could obtain if they were successful at trial. The Court stated that the injury suffered by the inmate plaintiffs did not impress it as severe, and that they had not demonstrated a strong likelihood of success on the merits. The Court further stated that a retransfer of the inmates to Wallkill might be injurious to the institution and injurious to the inmates themselves (Appendix, p. 45).

Subsequently, on November 27, 28 and 29, 1972 a trial was conducted by the District Court. At this time two of the four plaintiffs had been released on parole, and their cases were dismissed. The District Court heard testimony from respondent Newkirk, his co-plaintiff, Cornelius Lucas, and two other witnesses on their behalf. The Court also heard testimony from petitioner Butler, and from a deputy commissioner of correctional services, on his behalf. At the close of the trial, before any decision had been rendered by the District Court, petitioner Butler agreed to return respondent Newkirk and his co-plaintiff to Wallkill Correctional Facility.

On December 18, 1972 respondent Newkirk was restored to the truck driving job at Wallkill, which he had held prior to his transfer from that institution. On February 22, 1973, his co-plaintiff, Cornelius Lucas, was released on parole. Petitioners moved on April 3, 1973 to dismiss the case as moot, and their motion was granted by the District Court as to Cornelius Lucas, but denied as to respondent Newkirk.

In a decision dated October 9, 1973, the District Court held that respondent was denied due process of law by

being transferred from Wallkill to a maximum security facility, without prior warning of the conduct that would lead to a transfer or the fact that a transfer was a possibility. The Court also noted that in the circumstances of respondent's case, his transfer was as much a disciplinary measure as others for which an administrative hearing is provided in the prison rules, and that there was no clear and present danger sufficient to justify a transfer without warning (Appendix, p. 34).

On October 26, 1973, the District Court issued a final judgment declaring that respondent's interest in continuing to remain at Wallkill was sufficiently great that transfers in direct response to his activity deserved some sort of due process, at the very least the knowledge that it was a possibilty. The District Court further declared that respondent could not be transferred without being afforded prior notice of the rules of the institution and the acts on his part which would lead to his being transferred, and without being afforded a hearing at which he was advised of the charges against him and afforded an opportunity to explain his behavior before a relatively impartial tribunal, either prior to or shortly after the transfer. The District Court also declared that respondent was entitled to know the scope of permissible behavior at Wallkill and the circumstances which in petitioners' judgment would warrant his transfer to another prison (Appendix, p. 32).

Petitioners appealed the District Court's decision and judgment to the Court of Appeals for the Second Circuit. On June 3, 1974 that Court rendered a decision affirming and modifying the decision of the District Court. The Court of Appeals agreed with the District Court that respondent was entitled to minimal due process procedures before being transferred from a medium security institution to a maximum security institution, but it reversed the requirement that respondent was entitled to know in advance all of the acts on his part that would lead to a

transfer (Appendix, p. 21). The Court of Appeals also held that respondent's case was not moot in spite of his return to Wallkill, and that he was entitled to relief from the District Court.

B. Facts

At the trial in the District Court, the following salient testimony was elicited from the parties and witnesses.

Respondent Newkirk testified that he had been a New York State prison inmate since his conviction for murder in the second degree in 1962. He stated that prior to his placement at Wallkill Correctional Facility, he had been incarcerated at Ossining Correctional Facility, Attica Correctional Facility, Green Haven Correctional Facility and Auburn Correctional Facility (all of which are located in different parts of the state). He stated that upon his transfer to Wallkill, he was permitted to take instruction in auto mechanics, and later permitted to drive a truck and to leave the grounds in a truck. He said he attended classes in mathematics, English and history, and also engaged in musical activities by playing in a band and practicing his musical instruments during his leisure time. He said he was permitted to go about the institution on his own.

Newkirk stated that on June 8, 1972 he was performing his usual truck driving duties, when he was ordered to report to the prison hospital, while his belongings were packed by the guards. He said he was then transported to Clinton Correctional Facility, a maximum security institution in another part of the state, without being advised of the reason for the transfer, and without being given an opportunity to be heard. He admitted, however, that when he previously was transferred between two other institutions, no official told him of the reasons for the transfer.

Newkirk said that when he was transferred from Wallkill to Clinton Correctional Facility, he was not given an assignment in driving or auto mechanics, but he accepted an

assignment to do housework in the Superintendent's residence. He said that no one forced him to accept this assignment, and that the residence was located outside the prison walls. He said his wage was fifty-five cents per day, which was the same wage he earned as a truck driver at Wallkill. He said he had requested a truck driving assignment upon his arrival at Clinton, but had not renewed his request because he believed he was on a waiting list.

Newkirk further stated that he had permission to keep his muscial instrument in his cell at Clinton, but because of his long working hours he did not have time to practice it. He said that he did not have access to as many recreational activities at Clinton as he had at Wallkill, and he was not able to pursue his interests in glass work, painting and stone ware, that he pursued at Wallkill. He also said that at Clinton he was not permitted to possess certain articles in his cell, such as a lamp or typewriter, which he possessed at Wallkill, and he was more limited in his access to showers and hot water, and visiting and telephone privileges.

Significantly, Newkirk acknowledged that he was not placed in disciplinary confinement upon his arrival at Clinton, and that he did not lose any good behavior allowances as a result of the transfer. He further acknowledged that his transfers between other institutions prior to his placement at Wallkill, had resulted in a diminution of family visits, and that his first assignments at Wallkill were to perform porter duties and to haul garbage, whereas his previous assignment at Auburn Correctional Facility was to repair automobiles. He further stated that his initial wage rate at Wallkill was twenty-five cents per day, whereas his initial wage rate upon his transfer to Clinton was thirty cents per day.

Newkirk stated that during the period preceding his transfer from Wallkill he became interested in the concept of an inmate labor union, and signed a union constitution

on May 31, 1972. He said that on June 2, 1972 another Wallkill inmate gave him a union petition to sign, and he did so, and passed it on to other inmates with instructions to return it to the inmate who gave it to him. He said that later in the evening he heard an announcement over the public address system from a member of the inmate liaison committee, stating that the liaison committee had not sanctioned the union petition, and would meet with any inmates who wished to discuss the matter. Newkirk said that he did not become involved in any arguments, fights or threats over the union issue, and did not speak to any officers about it, and did not have further contact with authorization forms prior to his transfer from Wallkill on June 8, 1972.

Coy Smith, a former Wallkill inmate, testified on Newkirk's behalf. Smith said that on June 2, 1972 he did not observe any unusual activity, but he recalled an announcement over the public address system by a member of the inmate liaison committee. Coy remembered that the announcement stated that the inmate liaison committee was not responsible for the circulation of union petitions, and that the committee would meet with inmates at a designated place to answer questions about its position.

Smith said that fifteen or twenty inmates met with the members of the liaison committee on that night. Some inmates wanted to know why the committee was not supporting the union if the committee was supposed to represent the inmates, and one committee member was telling the inmates that the committee would support the union if it went through proper channels. Smith said that there were no fights or threats, but that there was some heated discussions, and that the inmates were speaking in loud voices trying to outtalk each other. He said that some inmates hollered back and forth, and some inmates did not like the way the inmate liaison committee member was answering questions. He said the inmates were not angry about having signed the petition, but that some of them were con-

fused about what they had signed and were fearful of administrative reprisals.

Smith acknowledged that he had not been disciplined for signing a union constitution, and that petitioner Butler had questioned him about it, but no action was taken against him, and he was paroled in September, 1972.

Eugene Eisner, an attorney specializing in labor law, also testified on behalf of Newkirk. He described the steps that were being taken to place the union petition of the Wallkill inmates before the New York State Public Employees Relation Board.

Walter Dunbar, a former deputy commissioner of correctional services, testified on behalf of petitioners. Dunbar stated that his experience in the correctional field included being a corrections officer, a supervisor of a crime study commission in California, a training officer of all personnel in the California Department of Corrections, an associate warden, a deputy director and director of the California Corrections Department; a chairman and member of the United States Board of Parole, a past president of the American Correctional Association, an editor of the *Manual of Correctional Standards,* and a member of the United States Attorney General's task force for innovative grants to improve corrections.

Dunbar said that there are a variety of reasons why an inmate may be transferred between correctional facilities. These include different quotas for different programs, an individual's adjustment to his assignment, critical information that indicates a danger to staff or personnel, and separation of inmates due to prior criminal experience together or hatred of one another. He said that transfer decisions are made at the institutional level by the superintendent and the classification committee, and made at the departmental level by a director of classification and movement. He said that where transfers are

necessitated by problems at institutions, a superintendent has the prerogative and responsibility to bring the matter to the attention of the correction department. He said that a superintendent has an acute responsibility to insure the safe and secure operation of his institution, and this may include dangerous or recalcitrant inmate behavior, homosexual triangles, the threat of violence between individuals, the threat of weapons being introduced, and other behavior which would disturb the order and stability of the institution.

Dunbar further stated that giving advance notice to an inmate prior to a transfer might create a security problem, because the inmate might resist violently, and other inmates might attempt to assist him. He said that conducting hearings would also create a problem because the revelation of confidential information leading to a transfer would be hazardous to the inmate or others. As an example he intimated that a superintendent could not run the risk of permitting weapons or drugs to be introduced into an institution before taking action to prevent it.

Dunbar stated that in the instant case a member of the department's classification staff had informed him that due to the circulation of petitions at Wallkill, there was a possibility of a confrontation between inmates of a different point of view, and a possibility of violence which warranted the transfer of certain inmates. Dunbar said that upon respondent's transfer from Wallkill to Clinton, there was no directive that respondent be placed in segregation, or lose any good behavior allowances, or suffer any punishment or deprivation of privileges as a result of the transfer.

Petitioner Butler testified on his own behalf. He stated that he began his career as a prison guard, and worked his way up to sergeant, lieutenant, assistant deputy superintendent, deputy superintendent, deputy commissioner in the correction department and Superintendent at Wallkill.

He said that Wallkill was a medium security institution with cells left open twenty-four hours per day, and a perimeter wire fence surrounding a portion of the facility. He said that it had extensive academic and vocational training programs, and many innovative programs that other institutions do not have. He said that Wallkill did not have a special housing unit or an isolation wing, and that inmates were chosen to go there by the Wallkill staff, and did not have a right to go there.

Butler stated that if there were hostilities between inmates, they would have to be transferred from Wallkill, whereas at maximum security institutions they would be placed in special housing for their own protection. He said that it would be impossible to isolate or segregate or control any section of the facility. He said that during the eighteen months prior to trial, 59 inmates had been transferred from Wallkill to other institutions, eighteen of which were deemed unsuitable for the Wallkill program. He said that these cases involved some inmates who were engaged in homosexual activities, some inmates who refused to become involved in the Wallkill program, and one inmate who was involved in a serious fight. He said that when inmates are transferred as unsuitable they are usually brought up on disciplinary charges, but that not all transfers were based on disciplinary offenses.

Butler said that he would not necessarily speak to an inmate prior to transfer, since it would depend on the purpose of the transfer. He said that in an emergency situation a telephone call is made to the central office, and the central office generally accepts the request and determines which institution the inmate is sent to. He said that the officers remove the inmate to the prison hospital while his belongings are packed and recorded on a transfer sheet, and then transport the inmate with his belongings to another facility. He said this procedure is followed to prevent inmates from barricading themselves in their cells or

encouraging fellow inmates to assist them in preventing the transfer.

With respect to the instant case, Butler said that on June 2, 1972 he received a telephone call at home, at 6:30 P.M., from an officer, who told him that a number of inmates were circulating a petition. Butler said that he was advised that there was no difficulty, and he told the officer not to interfere with the petition, but to keep the situation under observation and control. Butler said that he received a second phone call one hour later, telling him that the inmate liaison committee members were very disturbed because they had learned that the petitions were purportedly being circulated as having been sponsored by them. Butler spoke to one of the committee members, who asked to address the inmates over the public address system, to advise them that the committee did not sponsor the circulation of the petitions. Butler heard the inmate's prepared statement over the phone, and then gave him permission to use the public address system.

Butler said he received a third telephone call about one-half hour to one hour later, in which the officer advised him that unrest and tension had developed, and that there were loud arguments erupting in various parts of the institution. Butler ascertained that no fights had occurred and he told the officer to keep the matter under careful supervision and to let him know if anything developed. Nothing further happened that night, and the institution remained calm on the next two days, June 3 and 4, 1972.

On June 5, 1972, Butler asked a deputy superintendent to investigate the situation with respect to the union petitions, and the deputy reported that there was considerable tension, and that a group of inmates had been very vocal in their support of an inmate labor union, and the members of the inmate liaison committee were equally vocal in assuming that the union would detract from their authority or make their function useless. On June 6, 1972, Butler

called the central office and told them that there were a number of inmates who were creating a situation that could lead to trouble, and that he would like to transfer them to other facilities without disciplinary action. Butler said that he was fearful that at the upcoming Saturday night movie, an argument or serious discussion might end up in a riot. Butler also directed a supervisory officer to be present at the weekly meeting of the inmate liaison committee, to insure that no trouble occurred there.

Butler said that the assistant deputy superintendent reported to him that there were eight inmates, including plaintiffs, who were continuing to voice support for the inmate union, and that he was fearful that there may be trouble. He said that he conferred with his staff and decided to transfer five of these men, who were active in support of the union. Butler said that he did not normally oppose the circulation of petitions at Wallkill, but he was concerned about the union petition because of the attitude of the inmate liaison committee and other inmates against the petition. He said that he did not confiscate the petitions to prevent them from leaving the institution.

With respect to the five inmates who were transferred, Butler did not institute any disciplinary proceedings against them, and did not cause them to lose any good time or to be placed in segregated confinement, or to be treated differently at the receiving institutions. At the time of the trial, two of the five already had been paroled, as were various other inmates who had participated in the union activities. [As we noted previously, respondent's co-plaintiff was paroled subsequent to the trial, and his case was dismissed by the District Court as moot].

Reasons Why Certiorari Should be Granted

This Court should determine whether a prison inmate who is transferred between a medium security institution and a maximum security institution within a State, is entitled to a due process hearing, where no disciplinary punishment is imposed as a result of the transfer.

In its recent decisions on the subject of prisoners' rights, this Court clarified some of the important issues that have divided the lower federal courts. In *Wolff* v. *McDonnell*, 42 U.S.L. Week 5190 (June 24, 1974), this Court delineated the due process rights of prison inmates who were facing disciplinary punishments. In *Pell* v. *Procunier*, 42 U.S.L. Week 4998 (June 24, 1974), and *Saxbe* v. *Washington Post Co.*, 42 U.S.L. Week 5006 (June 24, 1974), this Court dealt with the power of prison officials to regulate confidential visits between prison inmates and newsmen. In *Procunier* v. *Martinez*, 42 U.S.L. Week 4606 (April 29, 1974), this Court defined the standards to be applied to the censorship of prisoners' mail, and struck down regulations which arbitrarily restricted attorney-client interviews. In *Warden* v. *Marrero*, 42 U.S.L. Week 4955 (June 19, 1974), this Court determined that federal prisoners who were convicted of narcotic offenses under former § 7237(d), 26 U.S.C., were not eligible for parole consideration in spite of the subsequent repeal of that statute.

The question of whether federal and state prisoners who are transferred between penal institutions are entitled to some form of due process procedures, is an issue that has divided the lower federal courts, and requires resolution by this Court. Some courts have held that such transfers, whether interstate or intrastate, require no due process procedures, while other courts have held that such transfers must be accompanied by full due process guarantees,

including confrontation and cross-examination of adverse witnesses. Some courts have held that there is a distinction between interstate and intrastate transfers, while other courts have rejected this distinction.

In *Kessler* v. *Cupp*, 372 F. Supp. 76 (D. Or. 1973), the court held that an inmate who was subjected to a non-consensual interstate transfer, was entitled to notice of the transfer, an opportunity to be heard and to confront adverse witnesses, representation by a lay advocate, a record of the hearing, and a review of the decision by the Superintendent and by higher administrative authorities. Similar relief was granted in *Ault* v. *Holmes*, 369 F. Supp. 288 (W.D. Ky. 1973), and *Noitt* v. *Vitek*, 361 F. Supp. 1238 (D. N.H. 1973).

Other federal courts have held that inmates facing involuntary out-of-state transfers are entitled to less extensive due process rights. See, e.g. *Gomes* v. *Travisono*, 490 F. 2d 1209 (1st Cir. 1973), vacated and remanded, —— U.S. —— (July 8, 1974); *Croom* v. *Manson*, 367 F. Supp. 586 (D. Conn. 1973); *Park* v. *Thompson*, 356 F. Supp. 783 (D. Ha. 1973); *Capitan* v. *Cupp*, 356 F. Supp. 302 (D. Or. 1972). Cf. *Bryant* v. *Hardy*, 488 F. 2d 72 (4th Cir. 1973) (district court should evaluate circumstances surrounding inmate's transfer from reformatory in Virginia to penitentiary in Illinois). Some courts have held that inmates who are transferred between states have no right to any due process procedures. See, e.g. *Fajeriak* v. *McGinnis*, 493 F. 2d 468 (9th Cir. 1974); *Hillen* v. *Director*, 455 F. 2d 510 (9th Cir. 1972), *cert. denied* 409 U.S. 989 (1972); *Batchelder* v. *Kenton*, —— F. Supp. ——, 3 Prison L. Rptr. 93 (C.D. Cal. Feb. 5, 1974).

The cases involving intrastate transfers of prisoners have also produced conflicting decisions. In *Stone* v. *Egeler*, —— F. Supp. ——, 3 Prison L. Rptr. 84 (W.D. Mich. Dec. 18, 1973), the court held that two Michigan inmates who were transferred 420 miles for disciplinary

reasons were entitled to a due process hearing. In *White* v. *Gillman*, 360 F. Supp. 64 (S.D. Iowa 1973), and in *Walker* v. *Hughes*, —— F. Supp. ——, 3 Prison L. Rptr. 109 (E.D. Mich. 1974), the courts held that inmates who were transferred from reformatories to long term adult prisons, were entitled to due process hearings. In *Aikens* v. *Lash*, 371 F. Supp. 482 (N.D. Ind. 1974), the court held that inmates who were transferred from a reformatory to a penitentiary, and routinely placed in segregation at the penitentiary, were entitled to due process hearings. In *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971), the court held that transfers between institutions of different custody levels did not require hearings, but that placement in segregation at the receiving institution did require due process procedures.

In *Schumate* v. *People of the State of New York*, 373 F. Supp. 1166 (S.D.N.Y. 1974), and in *Beatham* v. *Manson*, 369 F. Supp. 783 (D. Conn. 1973), the courts held that transfers between state institutions did not require due process procedures unless there was a change in custody level, as in the instant case. In *Benfield* v. *Bounds*, 363 F. Supp. 160 (E.D. N.C. 1973), the court held that transfers between state institutions were entirely a matter of administrative discretion. In *Gray* v. *Creamer*, 465 F. 2d 179 (3d Cir. 1972), the court held that a state prisoner has no vested right to remain in any particular prison.

These conflicting decisions make it apparent that this Court should resolve the transfer issue at the earliest possible time. A resolution of this issue is needed in the field of correction because of the variety of reasons underlying the uses of transfers by prison administrators.

Transfers are one of the primary management tools for the protection and rehabilitation of prisoners. It is well known that in penal institutions where large numbers of men are held in close custody, there is a need for security and discipline that does not exist in civilian society. Jus-

tice White recognized this problem in *Wolff* v. *McDonnell*, *supra*, where he noted that many prisoners "are recidivists who have repeatedly employed illegal and often very violent means to attain their ends", and who "may have very little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life." As a result of this lack of respect for persons and property, one of the most serious problems facing prison administrators is assaults by inmates against fellow inmates. The recent case law is replete with instances where prison officials have been sued for damages for failing to protect inmates from prisoner assaults. See, e.g., *Woodhous* v. *Commonwealth of Virgina*, 487 F. 2d 889 (4th Cir. 1973) ("A prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief"). See, also *United States ex rel. Miller* v. *Toomey*, 479 F. 2d 701 (7th Cir. 1973); *Parker* v. *State*, 282 So. 2d 483 (La. Sup. Ct. 1973). While the courts have generally denied recovery in these cases, they have put the prison officials on notice that reckless exposure of inmates to assaults by other inmates, will subject the officials to liability for damages.

The protection of individual inmates from each other is only one of the reasons why prison administrators need to transfer prisoners between institutions, often without warning and without delay. Another serious problem is the prevention of violent confrontations between prisoners and guards, and between rival groups of prisoners, which often have tragic consequences in a penal institution. Commonly, a warden will receive confidential information that a disturbance is being planned or that two groups of inmates are about to have a confrontation. Rather than wait for a conflagration to take place, particularly at a medium security or minimum security facility, a prison administrator must summarily remove the suspected

trouble makers to a different institution, where their potential for harm is immediately minimized. Similarly, after a riot has taken place, it is often necessary to separate groups of inmates by placing them at different facilities.

The power to transfer prisoners is also essential to the establishment of effective rehabilitation programs. Whether a prisoner should remain at one institution or another, is a classification decision that must be made by a correction department on the basis of a prisoner's background and institutional record. A decision to place an inmate at a particular institution, or to remove him from an institution, is an essential management function which requires expertise in the correctional field. In addition, the need to transfer prisoners may be influenced by staff and budgetary considerations, that make it necessary to close down portions of facilities or to terminate special programs.

In recognition of these considerations, the laws of many states and federal law, empower correctional authorities to transfer prisoners between institutions at their discretion. See, e.g., N.Y. Correction, § 23; 18 U.S.C. § 4802 (United States Attorney General "may at any time transfer a person from one place of confinement to another"). In addition, the New England states and many of the Western states have entered into interstate compacts which permit them to transfer inmates to other jurisdictions, if serious disciplinary problems arise or if adequate facilities are not available. Many states also transfer prisoners to federal custody if they cannot control them in their own facilities.

The decision below did not deal with these complex issues of penal administration, but merely upheld the ruling of the District Court that respondent Newkirk was entitled to minimal due process procedures in the circumstances of his case. The Court of Appeals' statement that

the form of due process to be afforded to the transferred prisoner will presumably "be molded to suit the seriousness of the charges in each case and the deprivations threatened by the transfer", does not provide the guidance to correctional officials that is needed on this important issue.

Finally, this Court should resolve the legal question that is at the heart of this case, namely, whether the Due Process Clause applies to every loss of privilege and every deprivation that is suffered by a prison inmate during the course of his confinement. It is undisputed in the instant case that respondent Newkirk did not receive any disciplinary punishment or suffer any loss of good behavior allowances as a result of his transfer from Wallkill Correctional Facility to a maximum security institution. It is also undisputed that Newkirk's co-plaintiffs were released on parole subsequent to their transfers, indicating that the disputed transfers had no adverse affect on their eligibility for parole. (Newkirk is not eligible to meet the Parole Board until 1975).

The court below based its decision on the deprivation of living conditions and job and training opportunities that Newkirk experienced as a result of his transfer from Wallkill, and it held that this was a "substantial loss" which entitled Newkirk to minimal due process procedures. The court rejected the argument that Newkirk's case was distinguishable from the interstate transfer cases, because it believed that his placement at a correctional institution far from New York City meant that he suffered the same privations as a prisoner who is transferred out of state.

While petitioners do not deny that respondent experienced less privileges at a maximum security institution than at a medium security institution, petitioners do not believe that this necessarily calls into play the Due Process Clause, or that this reduction of privileges should be considered a "substantial loss" in a legal sense. In *Wolff* v.

McDonnell, supra, this Court drew a distinction for due process purposes, between revocation of parole and the imposition of disciplinary punishment within a prison. This Court held that a prisoner facing institutional charges is not entitled to the same degree of protection under the Due Process Clause as a parolee whose liberty is at stake in a revocation hearing. By analogy, a prisoner who is transferred without the imposition of disciplinary punishment or adverse consequences to his parole, may suffer less deprivations in a legal sense than a prisoner who is transferred for disciplinary reasons and immediately placed in solitary confinement at the receiving institution. Thus, some transferred prisoners may not be entitled to any due process procedures, while others may be entitled to the same procedures that apply for disciplinary offenses.

By focusing on the loss of job and training opportunities and the distance involved in respondent's transfer, the court below was establishing vague and unworkable criteria for due process, that only add confusion to a difficult area of constitutional law. In addition, the court's reasoning ignores respondent's testimony that he experienced similar losses of family visits and other privileges when he was transferred between maximum security institutions prior to his transfer to and from Wallkill.

While due process procedures may be helpful in making rational determinations in cases of disputed facts, they may not be constitutionally required in all cases where a person suffers a deprivation of a right or privilege. Cf. *Arnett* v. *Kennedy,* 42 U.S.L. Week 4513 (April 16, 1974). The instant case provides this Court with an opportunity to clarify the due process rights of prison inmates who are facing a loss of privileges without the imposition of disciplinary punishment, an issue which has implications for all persons in custodial institutions.

In light of the deep division among the lower federal courts on the rights of transferred prisoners, and in light

of the failure of the court below to deal with the broader issues in this case, petitioners believe that their application warrants plenary consideration by this Court.

CONCLUSION

Petitioners' application for certiorari should be granted.

Dated: New York, New York, August , 1974.

Respectfully submitted,

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Appendix A

Decision of United States Court of Appeals for the Second Circuit, dated June 3, 1974.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 979—September Term, 1973.

(Argued May 9, 1974 Decided June 3, 1974.)

Docket No. 73-2858

JAMES NEWKIRK,

Plaintiff-Appellee,

—against—

HAROLD N. BUTLER, Superintendent, of Wallkill Correctional Facility, and PETER PREISER, Commissioner of Correctional Services,

Defendants-Appellants.

Before:

ANDERSON, FEINBERG and MANSFIELD,

Circuit Judges.

MANSFIELD, *Circuit Judge:*

On June 8 and 9, 1972, appellee James Newkirk and four other inmates of Wallkill Correctional Facility ("Wallkill" herein), a medium security institution, were summarily transferred to maximum security facilities in New York in response to their alleged activities in support of a prisoners' union at Wallkill. Newkirk and three of the

other four brought suit in the Southern District of New York pursuant to 28 U.S.C. §§ 1343(3), (4), and 42 U.S.C. § 1983 against the Superintendent of Wallkill and the State Commissioner of Correctional Services for a declaration that the transfers were in violation of the Constitution and laws of the United States and for injunctive relief. Prior to a decision in the action, which was tried in November, 1972, before Judge Robert J. Ward, sitting without a jury, all plaintiffs except Newkirk were released on parole and the action was dismissed as to them. Newkirk was returned to Wallkill but the action continued as to him. In a decision dated October 9, 1973, the district court held that the transfer violated the due process clause of the Fourteenth Amendment since it had been made without any explanation to Newkirk or opportunity to be heard. On October 23, 1973, the court entered a declaratory judgment accordingly, which, while denying injunctive relief, directed that no adverse parole action be taken against Newkirk, or punishment administered, because of the transfer and that Newkirk be told the "scope of permissible behavior at Wallkill and the circumstances which . . . would warrant his transfer to another prison." The Superintendent and State Commissioner appeal. With modification we affirm.

Wallkill is a unique state correctional facility because it permits its inmates, who live in rooms rather than cell blocks, maximum free time and freedom of movement and gives access to numerous recreational and rehabilitative programs not available at other state correctional facilities. Because of its several advantages, which are more fully described in the district court's opinion, see 364 F. Supp. 497 (S.D.N.Y. 1973), admission to Wallkill is generally sought after and usually comes only after a state prisoner has spent time at a maximum security facility and has undergone an extensive screening procedure.

Appellee Newkirk, after being convicted of second degree murder in 1962, was incarcerated at Sing Sing and

Green Haven before first applying in 1965 for admission to Wallkill, to which he was not admitted until 1971. At Wallkill he took instruction in auto mechanics, attended classes in mathematics, history and English, and, during his leisure time, played musical instruments and pursued other artistic interests. Newkirk also drove a truck at Wallkill and at times was permitted to leave the prison grounds as part of this employment.

Sometime prior to June 1972 several Wallkill inmates began circulating petitions to form an inmates' union. These activities were openly opposed, not by prison officials but by members of the elected Inmate Liaison Committee (the "Committee"), which had general responsibility for the processing of inmate grievances. On June 2, 1972, the Committee held a general meeting of the inmates at which it disclaimed any support for the union. The discussions at this meeting, although vociferous, were not violent. Newkirk, who had previously signed a proposed union constitution, did not attend this meeting but immediately prior to it received a union petition from a fellow inmate, signed it, and passed it along to another inmate.

Concerned about a possible threat to the stability of the prison, Lieutenant Connolly, the officer in charge of Wallkill on the evening of June 2, a Friday, telephoned reports to Superintendent Butler who had left Wallkill and was at his home for the weekend. Connolly also prepared a written report for Assistant Deputy Superintendent O'Mara in which he identified, based on what other officers had told him,[1] Newkirk as one of the inmates who had been canvassing for the union. On Tuesday, June 6, O'Mara recommended to Butler that eight inmates, including Newkirk, be transferred from Wallkill. Before making his

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[1] Connolly could not remember specifically which officers had identified particular inmates as participants in the union organizational drive.

recommendations O'Mara did not talk to Newkirk[2] and did not know who had observed him canvassing for the union or the extent of his activities. Butler decided to transfer Newkirk and four others on O'Mara's list without ever talking to the inmates involved and without personally observing any of their activities or even discussing the events of Friday evening with Connolly who was the officer in charge and who had never recommended that anyone be transferred. The transfers were accomplished on June 8 and 9 when the inmates were summoned to the prison infirmary and told they were being sent away immediately. They were not told the reason or given any opportunity to contest the action.

Newkirk was transferred to Clinton Correctional Facility where he was placed in a barred cell, openable only by a guard, and was unable to pursue many of the activities he had engaged in at Wallkill. Although he asked for a job involving auto mechanics or driving, he was employed by the Clinton Superintendent as a housekeeper at a salary less than what he had earned at Wallkill. Newkirk worked for the Superintendent seven days a week, often for 13 or 14 hours per day. Visits to Newkirk by members of his family were more restricted, since Clinton is located further from New York City, where Newkirk's family lives, than Wallkill.[3] In light of these and other deprivations suffered by Newkirk, and since the transfer was in direct response to his presumed activity in support of the inmates' union, the district court rejected appellants' argument that the transfer was "administrative," and hence beyond due process requirements, because it had not resulted from formal disciplinary proceedings and had not involved any loss of

[2] O'Mara recommended eight employees for transfer. He had talked to only one of them, Passanante, whom O'Mara placed at the bottom of his list for transfer since Passanante was "very scared" and "apparenlty willing to cooperate."

[3] Wallkill is located approximately 80 miles north of New York City, whereas Clinton, located outside of Plattsburgh, New York, is approximately 300 miles from New York City.

good time or segregated confinement. Specifically the court declared:

> "1) plaintiff Newkirk's interest in continuing to be situated at Wallkill is sufficiently great that transfers in direct response to his activity deserves some sort of 'due' process, at the very least the knowledge that it is a possibility;
>
> "2) transfer from Wallkill to maximum security institutions is used by the defendants for disciplinary purposes;
>
> "3) plaintiff Newkirk could not be transferred without being afforded due process, including
>
> a) prior notice of the rules of the institution and what acts on his part would lead to his being transferred;
>
> b) a hearing at which he was informed of the charges against him and afforded an opportunity to explain his behavior before a relatively impartial tribunal either prior to the transfer or if prompt action is essential, as soon thereafter as practicable; . . . ."

The court entered the above-described judgment (*supra*, p. 2) and denied appellants' requests for a resettlement which would limit the judgment to cases involving disciplinary transfers only and for a stay of that portion of the judgment directing appellants to notify Newkirk of the conduct that would lead to transfer from Wallkill.

Appellants argue that a hearing may be constitutionally required only for "disciplinary" transfers—i.e., transfers made as punishment for past rule violations.[4] See 7

[4] Appellants' brief (p. 22) states:

"Appellants do not quarrel here with the District Court's order insofar as it it holds that, as a matter of law, if an inmate

(footnote continued on following page)

N.Y.C.R.R. Part 250, et seq. They urge that transfers for other purposes (e.g., transfer to separate inmates who are hostile to each other or to prevent threatened disturbances before they occur, which involve no formal disciplinary proceedings, loss of good time, segregation, or adverse parole consequences) be classified as purely "administrative" and left within the exclusive discretion of prison officials. Besides being inappropriate in these cases, appellants argue, notice and a hearing might touch off exactly the disturbance which a transfer could avoid.

Classification by label (e.g., as "administrative" or "disciplinary") may facilitate prison administration but it cannot be used as a substitute for due process. In our view appellees' position gives insufficient consideration to the very real loss that an inmate may sufer even when his transfer is not part of formal disciplinary proceedings and has no adverse parole consequences. It also overlooks the danger that a transfer, when based on rumor or "confidential" information about an inmate's behavior, past or planned, may be arbitrary and unjustified by the facts. These factors, the adverse consequences to the prisoner and the chance of error, are the principal elements to be considered in determining what process is due the transferred prisoner, rather than the label put on the transfer. Where the prisoner suffers substantial loss as a result of the transfer he is entitled to the basic elements of rudimentary due process, i.e., notice and an opportunity to be heard. See *Gomes* v. *Travisono,* 490 F.2d 1209 (1st Cir. 1973); *Ault* v. *Holmes,* 369 F. Supp. 288

(footnote continued from preceding page)

> is transferred from Wallkill Correctional Facility solely as a disciplinary punishment in response to an act of misconduct, the inmate must, before or shortly after such transfer, be given notice of the gravamen of the misconduct and an opportunity to be heard in relation thereto. Indeed the regulations of the Department of Correctional Services require that disciplinary punishments be preceded by notice and hearing before punishment may be imposed (see 7 N.Y.C.R.R. Part 250 et seq.)."

(W.D. Ky. 1973); *Hoitt* v. *Vitek,* 361 F. Supp. 1238 (D.N.H. 1973); *White* v. *Gillman,* 360 F. Supp. 64 (S.D. Iowa 1973); *Capitan* v. *Cupp,* 356 F. Supp. 302 (D. Ore. 1972). See also *Landman* v. *Royster,* 333 F. Supp. 621, 645 (E.D. Va. 1971) (questioning distinction between deprivations constituting "punishment" and those presented as techniques for the maintenance of "control" or "security"). While no formal disciplinary proceedings were involved in the present case the district court found that Newkirk was deprived of living conditions and job and training opportunities for which he had waited for six years and which he was apparently eager to retain. Since this was a substantial loss he was entitled to know the reasons for the transfer, to be heard, and to be permitted to demonstrate the existence of factual errors in the basis for the discharge. Since his right to minimum due process is clear in the circumstances of this case, it becomes unnecessary for us to decide whether some form of due process is required in the case of every transfer of a prisoner. See *Gomes* v. *Travisono, supra* at pp. 1213-14.

Nor can a denial of due process to Newkirk be justified on the ground that his transfer was intrastate rather than to a prison outside the state (the situation in *Gomes*), since the deprivations in both cases were, as a practical matter, equally severe.[5] See *Stone* v. *Egeler,* —— F.Supp. ——, 3 Prison L. Rep. 84 (W.D. Mich. Dec. 18, 1973); *Aikens* v. *Lash,* 371 F. Supp. 482 (N.D. Ind. 1974); *White* v. *Gillman, supra.* "In a prison setting where liberty is by necessity shrunken to a small set of minor amenities, such as work or schooling privileges, visitations, and some modicum of privacy, it is likely that any marked change

[5] For example one of the privations referred to in *Gomes* was the increased difficulty of communication and visitation. See also *Capitan* v. *Cupp,* 356 F. Supp. 302 (D. Ore. 1972). Due to the increased distance of Clinton from New York City, see note 3 *supra,* and more limited telephone privileges, the same privations were suffered here.

of status which forecloses such liberties will be perceived and felt as a grievous loss." *Palmigiano* v. *Baxter*, 487 F.2d 1280, 1284 (1st Cir. 1973). See also *Diamond* v. *Thompson*, 364 F. Supp. 659, 664 (M.D. Ala. 1973). Indeed, in light of our decision that a substantial deprivation of benefits and privileges within the prison walls itself entitles a prisoner to some form of due process, see *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971), it would be something of a paradox if prison authorities could by transferring a prisoner for disciplinary reasons to another institution (within or without the state) deprive him of due process rights to which he would be entitled upon a transfer within the prison itself.

Fundamental fairness furthermore requires that substantial deprivations "should at least be premised on facts rationally determined." See *Sostre* v. *McGinnis*, *supra* at 198; *United States ex rel. Campbell* v. *Pate*, 401 F.2d 55, 57 (7th Cir. 1968) ("the relevant facts . . . must not be . . . capriciously or unreliably determined."); *Dunn* v. *California Dept. of Corrections*, 400 F.2d 340, 342 (9th Cir. 1968); *Shelton* v. *United States Board of Parole*, 128 U.S. App. D.C. 311, 388 F.2d 567, 576 (D.C. Cir. 1967) (en banc.)[6] Here the need for at last a rudimentary hearing, with Newkirk afforded a reasonable opportunity to explain his activities, was obvious. The Superintendent's decision to transfer Newkirk as a leading proponent of the inmates' union was based only on third-hand reports prepared by officers who had not personally observed Newkirk's conduct which, as it turns out, had apparently been limited to the single act of signing and passing along a union petition. A hearing might well have established that he was but a

[6] It is irrelevant, as appellants seem to suggest, whether the factual inquiry has anything to do with the possible commission of a crime or other rule violation. See *Goldberg* v. *Kelly*, 397 U.S. 254 (1968).

passive pawn in a larger power struggle,[7] who had not intended to involve himself in further union activities, particularly if they would jeopardize his continued presence at Wallkill.[8] Indeed, with respect to one of the other inmates transferred, the Superintendent conceded at the trial in the district court that a further investigation would have revealed significantly less involvement with the union than had originally been supposed. Where no hearing at all is granted and the inmate is never given any opportunity to respond to or contradict reports of his activities or intent, the risk of such mistakes is substantial. See *Gomes* v. *Travisono*, 353 F. Supp. 457, 462 (D.R.I.), *aff'd.*, 490 F.2d 1209 (1st Cir. 1973).

Turning to the district court's judgment, we believe that, with one or two modifications, it satisfactorily prescribes the minimum due process to which Newkirk is entitled. At the same time it does not attempt to foist a formal-type notice or hearing on the state. Presumably the form will be molded to suit the seriousness of the charges in each case and the deprivations threatened by the transfer. Furthermore the order recognizes that under some circumstances there may be compelling reasons for immediate transfer without notice and prior to hearing (e.g., where the transfer is made because of fear of an imminent prison uprising or because of fire, flood, outbreak of an epidemic, or the like) andaccordingly provides that "if prompt action is essential" the hearing may be held as soon after the transfer "as practicable." This provision permits prison officials to act immediately in instances where notice will

[7] According to Assistant Deputy Superintendent O'Mara, it was "reliably" reported that one union petition circulating through the Wallkill population included 225-230 signatures.

[8] We note that the one prisoner who was forewarned of his possible removal fron Wallkill, Passanante, quickly indicated his willingness to cooperate and, as a result, was placed at the bottom of O'Mara's list for transfer. See note 2 *supra*.

touch off the very disturbances which the transfer is designed to avoid.

In one respect, however, we believe that the order requires modification. Paragraphs (1) and (5)b of the order would require state prison officials immediately to inform Newkirk of all future activities or behavior on his part which would be grounds for transfer of him to another institution. While we agree that advance publication of rules governing the conduct of prisoners at Wallkill, to the extent that such rules can be formulated in clear and unambiguous terms, would serve the salutary function of avoiding misunderstanding and resentment on the part of the prison population, *Rhem* v. *McGrath*, 326 F. Supp. 681, 691-92 (S.D.N.Y. 1971), it would be impossible, other than through the use of vague and meaningless generalities, to set forth all acts on Newkirk's part that could conceivably require his transfer out of Wallkill. Compliance with this portion of the district court's order, as it stands, might also preclude the flexible exercise of discretion based on changing conditions within the "volatile atmosphere of a prison," see *Sostre* v. *Otis*, 330 F. Supp. 941, 945 (S.D.N.Y. 1971). We could not affirm such a requirement without placing prison officials in an unnecessary straitjacket. We therefore hold that the final order of the district court should be modified to delete from paragraph 1 the words "at the very least the knowledge that it is a possibility," from Paragraph 3(a) that part which directs that Newkirk be given prior notice of "what acts on his part would lead to his being transferred," and all of paragraph 5(b).

We find no merit in appellants' additional argument that Newkirk's action should have been dismissed as moot prior to the decision on the merits since prior thereto he had been returned from Clinton to Wallkill. Even after his return he remained subject to a new transfer at any time based on mere rumor or surmise which he had no opportunity to answer or refute. In light of the state's continued insistence on its policy of not providing the inmate with any opportunity to respond to information against him, the likelihood of such a transfer was concrete rather than remote, speculative, or contingent. See *Super Tire Engineering Co.* v. *McCorkle*, 42 U.S.L.W. 4507 (April 16, 1974); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *McGrain* v. *Daugherty*, 273 U.S. 135, 181-82 (1927). See generally Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 137-47 (1945). Furthermore, notwithstanding the Superintendent's good faith assurances in support of appellants' motion for dismissal that there would be no adverse effects from the transfer as far as consideration for parole was concerned, we think that Newkirk was entitled to a judicial decree to that effect.

The judgment and order of the district court is affirmed as modified.

Appendix B

Final Judgment of United States District Court for the Southern District of New York, entered on October 29, 1973.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FINAL JUDGMENT

72 Civ. 2851
R.J.W.

JAMES NEWKIRK and CORNELIUS LUCAS,
Plaintiffs,

against

HAROLD N. BUTLER, Superintendent of Wallkill Correctional Facility, and PETER PREISER, Commissioner of Correctional Services,
Defendants.

This cause came on to be heard on November 27, 28 and 29, 1972, and was argued by counsel, and thereupon, upon consideration thereof, the court having rendered and filed an opinion and made and filed findings of fact and conclusions of law, all dated October 9, 1973, it is hereby

ORDERED, ADJUDGED and DECREED that the action is dismissed as to plaintiff Lucas and that defendants' transfer of plaintiff Newkirk from Wallkill Correctional Facility (hereinafter "walkill"), a medium security prison, to a maximum security prison on June 8, 1972 violated plaintiff's rights under the Constitution and laws of the United States, in that:

1) plaintiff Newkirk's interest in continuing to be situated at Wallkill is sufficiently great that transfers

in direct response to his activity deserves some sort of "due" process, at the very least the knowledge that it is a possibility;

2) transfer from Wallkill to maximum security institutions is used by the defendants for disciplinary purposes;

3) plaintiff Newkirk could not be transferred without being afforded due process, including

a) prior notice of the rules of the institution and what acts on his part would lead to his being transferred;

b) a hearing at which he was informed of the charges against him and afforded an opportunity to explain his behavior before a relatively impartial tribunal either prior to the transfer or if prompt action is essential, as soon thereafter as practicable;

4) the situation at Wallkill on June 8, 1972 did not represent so clear and present a danger to the security of the prison as to justify transferring plaintiff Newkirk without warning; and

5) plaintiff Newkirk is entitled to

a) have no adverse action taken against him whether with reference to parole or discipline, based on the fact of his transfer on June 8, 1972; and

b) know the scope of permissible behavior at Wallkill and the circumstances which in defendants' judgment would warrant his transfer to another prison.

Dated: New York, New York, October 26, 1973

/s/ Robert J. Ward
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED OCTOBER 29, 1973
of Raymond F. Burghardt
Clerk

Appendix C

Opinion of District Court, dated October 9, 1973.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2851
R.J.W.

JAMES NEWKIRK and CORNELIUS LUCAS,

Plaintiffs,

against

HAROLD N. BUTLER, Superintendent of Wallkill Correctional Facility, and RUSSELL G. OSWALD, Commissioner of Correctional Services of the State of New York,

Defendants.

WARD, D. J.

This is an action brought under 28 U.S.C. 1343 (3) and (4) and 42 U.S.C. 1983, seeking declaratory and injunctive relief against alleged unconstitutional punishment. The four original plaintiffs were inmates of Wallkill Correctional Facility ("Wallkill"), a medium security prison, serving sentences of imprisonment imposed by New York State courts. They were transferred from that institution to two maximum security institutions (plaintiffs Newkirk and Lucas to Clinton Correctional Facility, plaintiffs Oliver and Rodriguez to Auburn Correctional Facility) on June 8, 1972 by the orders of and under the authority of defendants Harold N. Butler, Superintendent of Wallkill, and Russell G. Oswald, Commissioner of Correctional Services of the State of New York.

The gravamen of the complaint is alleged imposition of punishment without due process of law, and solely for exercise of First and Sixth Amendment rights. The relief requested is a declaration that defendants had violated plaintiffs' constitutional rights, and an injunction ordering their return to Wallkill, expunging all record of their transfer, and prohibiting future transfers without a due process hearing.

Prior to the commencement of the trial, two of the plaintiffs, Oliver and Rodriguez, were released and the complaint was dismissed insofar as it related to them. Following the trial, plaintiff Lucas was released and the action is dismissed as to him as well. The action continues as to plaintiff Newkirk.

The transfers followed several weeks of activity during which plaintiffs had circulated for inmate signatures petitions to form a union at Wallkill. Obtaining the requisite number of inmate signatures was to be the first step in a process of gaining official recognition as a collective bargaining unit. This effort generated some vociferous controversy among the prisoners but was never forbidden or even actively discouraged by the prison officials, although they did watch closely and monitor the level of unrest within the prison. Tension among the inmates stemmed in part from the unwillingness of the existing prisoner representatives to support the petitions, and the consequent fear among other inmates that the authorities also opposed the efforts to unionize and that there would be reprisals against those who signed the petitions. The verbal controversy apparently peaked on June 2, 1972, with a general meeting at which the petitions were discussed in loud voices. The meeting dispersed peacefully and there were no incidents of violence or threats of violence. On June 8, after several days of apparent calm, the plaintiffs were summoned to the infirmary and informed that they were being transferred immediately. They were not told why or given any opportunity to contest the transfers.

The institutions to which the plaintiffs were transferred are maximum security institutions, and the conditions there contrast strikingly with those in Wallkill, a medium security institution. The cells are locked, the guards armed, the access to library and recreational facilities more limited, the space more crowded, and the rehabilitation programs significantly less extensive. The prisons are at a greater distance from New York City where these prisoners' families live, and visiting is therefore restricted; the use of the telephone to communicate with family is also limited. Additionally, the fact of transfer itself involved some hardships: the prisoners were kept for various times in segregation "for screening purposes" and were unemployed (on "idle" status) pending reassignment to work. Their eventual new jobs paid less than those they had performed at Wallkill.

Trial was accelerated in lieu of preliminary relief. After all the witnesses were heard, but before a decision was rendered, defendants represented that the remaining two plaintiffs were being returned to Wallkill. Counsel expressed the hope that the parties could stipulate to a consent order resolving the controversy, and decision was reserved. The settlement negotiations having broken down, defendants moved to dismiss the complaint as moot, since plaintiffs were no longer in the complained-of maximum security prisons, and three of the four plaintiffs had been released on parole. Plaintiff Newkirk opposes that motion, contending that the practices of defendants place him and other inmates under continuing fear of summary reprisal for the exercise of their First and Sixth Amendments rights.

For the reasons discussed below, the prayer for declaratory relief is granted, the prayer for an injunction ordering the return of the prisoners to Wallkill is dismissed as moot, and the prayer for an injunctiaon against future summary transfers is dismissed because in the present posture of the case there is not a sufficiently delineated controversy to merit its adjudication.

Newkirk contends that the action of defendants amounted to the imposition of significant punishment without due process of law, and solely for the exercise of his First and Sixth Amendment rights. Defendants reply that the transfers were an administrative, not a disciplinary, act, that therefore their discretion must remain unfettered, and that prisoners are not entitled to a due process hearing prior to transfer. They maintain, moreover, that if the activity of plaintiff was protected under the First and Sixth Amendments, there was sufficient justification in the urgency of the situation to merit their action. The issues raised are of such scope that a preliminary discussion of the applicable law is appropriate.

It can no longer be questioned that prisoners, while forfeiting, as a necessary corollary of prison life, significant rights and privileges enjoyed by the general populace, retain those basic rights which are not incompatible with the running of the penal institution.[1] Many cases in recent years have delineated the precise scope of these protections. Among those rights of prisoners which the courts will protect with special solicitude are the First Amendment right to hold and to express beliefs and to receive information, the Sixth Amendment right of access to the courts, and the Eighth Amendment right of freedom from cruel and unusual punishment, that is, from deprivation of the most basic human needs.[2] Any punishment imposed which infringes on these rights is examined with the strictest scrutiny, and the state must justify its acts by demonstrating the most pressing necessity. As Judge Weinfeld expressed the standard in *Fortune Society* v. *McGinnis*, 319 F. Supp. 901 at 904 (S.D.N.Y. 1970), the state must show ". . . a compelling state interest centering about prison security, or a clear and present danger of a breach of prison security, or some substantial interference with orderly institutional administration." These rights are not absolute, nor even as extensive as those enjoyed by the general populace; the prison authorities remain free to regulate,

for example, the manner of speech and the time and place of access to legal resources, to the extent justified by the true exigencies of maintaining prison discipline.[3] But the regulation must not be such as to abrogate the right, nor more restrictive than justified by the need for discipline.

Outside this area of constitutionally protected rights lies the realm of "day-to-day prison discipline" or administration in which courts and particularly federal courts are traditionally reluctant to interfere. The state and the prison authorities are free, in this area, to prescribe rules and discipline for infractions, with wide discretion and without the close scrutiny described above.[4]

In this realm, however, the courts have articulated the right of prisoners to be free from the arbitrary imposition of sanctions, even when basic rights are not infringed upon. Thus, the Court of Appeals for the Second Circuit in *Sostre* v. *McGinnis*, 442 F.2d 178, 198 (2d Cir. 1971), while rejecting the lower court's formulation of elaborate guarantees, stated, "We are not to be understood as disapproving the judgment of many courts that our constitutional scheme does not contemplate that society may commit lawbreakers to the capricious and arbitrary actions of prison officials . . . ," and mandated a certain minimal due process before severe sanctions were imposed. And in *Carothers* v. *Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970), Judge Mansfield said, "Although a prisoner does not possess all of the rights of an ordinary citizen he is still entitled to procedural due process commensurate with the practical problems faced in prison life . . ." at 1028. The amount of process which is "due" becomes the crucial question, decided by a balancing of the interest infringed upon against the needs of the prison system.

The classic statement of this balancing process was made in *Hannah* v. *Larche*, 363 U.S. 420 (1960) and repeated by the court in *Sostre, supra*.

> "[A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a particular proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." 363 U.S. at 442.

These rules of fair play apply whether the interest of the prisoner is called a right or a privilege, and whether the action of the official is deemed disciplinary or administrative. For ultimately the end of all prison discipline is the proper administration of the prison.

> "Rejection of the right-privilege distinction as a sterile form of words has likewise cast doubt upon the logical difference between deprivations constituting 'punishment' and those presented as techniques for the maintenance of 'control' or 'security'. Presumably the consequence of labeling a deprivation a matter of control is that it may be imposed without procedural preliminaries. The distinction is unpersuasive."
> *Landman* v. *Royster*, 333 F. Supp. 621 at 645 (E.D. Va. 1971).

Recent cases have enumerated the interests of inmates as well as the needs of the prison system. *Landman* v. *Royster, supra*, contained a particularly full discussion of the balance in the prison context. The opinion stated:

> "The Court must identify and analyze the precise nature of the individual interest at stake and compare it with the purpose and function of the governmental body. . . . The disciplinary function fulfilled in the decision to place a man in solitary confinement, to deny good time credit, to 'padlock' him in his cell involuntarily, or to impose the substantial disabilities

of maximum security confinement, adjudicates the question of a substantial deprivation or grievous injury. Whether cast in terms of a finding of unfitness to circulate in the general population or seen as a determination of guilt, the decision to place a man under greater than usual restraint is founded upon a finding of non-compliance with general prison standards. . . ." (333 F. Supp. at 652.) It continued, "A proper consideration is the effect that the introduction of procedural safeguards may have on legitimate prison functions, both within and without the ambit of discipline. . . .", citing security, administrator's leeway and time, speedy handling of some infractions on the spot. (at 652.)

See also, e.g., Sostre, supra; Carothers, supra; Bundy v. *Cannon,* 328 F. Supp. 165 (D. Md. 1971).

Throughout this balancing process, the touchstone is fundamental fairness: if the most elemental rules of fairness are violated, unwarranted by the exigencies of the situation, then the requisite due process has not been accorded. This assessment of fundamental fairness begins at the most basic level. Prisoners are entitled to know what the rules are, what actions will be met with sanctions.[5] They are entitled to know the general range of sanctions that may be imposed for given offenses. They are entitled to know, before punishment is imposed, the charge against them, and to explain their behavior, before a relatively impartial tribunal.[6] If the situation is such that prompt action is essential, the proper hearing must follow as soon as practicable. This is not to say that a "full due process hearing" is required, but simply procedural safeguards appropriate to the prison setting and sufficient to ensure against arbitrary action or action based upon erroneous information.[7]

In this context, we turn now to the specific situation before us. We need not decide today whether circulating

petitions for signatures as the first step toward obtaining official recognition of a union as a collective bargaining agent falls within the realm protected by the First and Sixth Amendments,[8] so that the rules and sanctions established by the authorities would be subject to the strict standard of scrutiny; it is thus also unnecessary to judge whether transfer to prevent circulation of the petitions was justified by the unrest caused. For it is apparent, on the facts before the court, that in the present situation, even treating this as an area fully within the discretion of the authorities to regulate, plaintiff's due process rights were violated at a basic level.

There were no explicit rules governing the conduct of these inmates; they were acting within what guidelines were made known to them. Communication among prisoners at Wallkill was not restricted; a room was provided for meetings; the authorities were fully aware that petitions for the union were being circulated for many days, before they transferred plaintiff. At no time was plaintiff requested not to circulate the petitions, nor was it officially indicated to him that this was a matter of concern to the auhorities. A large element of the unrest in fact resulted from the fear of some of the signers of the petitions that there would be reprisals, but until the circulators of the petitions were transferred there was no official indication that the authorities objected. This court is unable to find that the situation represented so clear and present a danger to the security of the prison as to justify transfer without warning.

Moreover, it is quite evident that to be located at Wallkill is a status prized by inmates. The advantages of the facility over other correctional institutions are numerous. Whether it is deemed a right or a privilege, the interest in continuing to be situated there is sufficiently great that transfer in direct response to his activity deserves some sort of "due" process, at the very least the knowledge that it is a possibility.

It is also evident that the transfer procedure, while termed "administrative," is at Wallkill at least used for disciplinary purposes. The record shows that the arsenal of disciplinary measures available in other institutions is less complete at Wallkill: there are no rooms for segregation aside from two infirmary rooms; the cells themselves are not locked; it is not feasible to isolate one inmate for special sanctions. Thus, if an inmate is found to be disruptive of the general rehabilitative scheme of the prison the only alternative is to transfer him. And he can only be transferred to a higher security, less desirable, institution. This, combined with the high value placed by the inmates themselves on their assignment to Wallkill, makes this "administrative" tool also a powerful disciplinary device. The fact that it is also used for purely administrative reasons in some instances does not shield it from the requirements of due process (of whatever appropriate form) when it is used and perceived as a disciplinary device.

Thus, the court today holds that on the facts before it, defendants' use of the transfer procedure violated plaintiff's right to due process at the most fundamental level: plaintiff was not informed of the "rules of the game" nor of the possible sanctions for their violation, yet was subjected to significant loss when he "transgressed." It matters not that the authorities have the power to regulate the activities of the inmates in their discretion, or to transfer the inmates for a wide range of reasons; even notice of the charges and a hearing after the offense would not bring this situation within the parameters of the process that was due. The court also notes that in this circumstance transfer was as much a disciplinary measure as others for which an administrative hearing is provided in the prison rules.

Plaintiff has requested injunctive relief restraining defendants *in futuro* from imposition of any further punitive transfers of plaintiff from Wallkill to any other correctional facility without affording him his procedural due process rights, including but not limited to written notice of the charges, knowledge of the facts upon which the transfer was based, a hearing before an impartial tribunal and an opportunity to question and challenge this basis. He contends that he is under continuing fear of summary transfer for the exercise of his First and Sixth Amendment rights.

This court is not persuaded that the threat of transfer is sufficiently great at this time to justify granting the injunctive relief sought by plaintiff. In the context of the present case it is sufficient to require that the prison authorities make known to plaintiff the scope of permissible behavior and the circumstances which in their judgment would warrant transfer.

Plaintiff also requests an order to expunge all record of the transfer from his file. Since it has been represented to the court that an explanatory note has been included with the record of transfer, and that no action adverse to plaintiff, whether with reference to parole or discipline, will be based on this information, this request is also denied.

The foregoing constitutes the findings of fact and conclusions of law of the court for the purposes of Rule 52, Fed. R. Civ. P.

Settle judgment on notice.

Dated: October 9, 1973

ROBERT J. WARD
U. S. D. J.

NOTES

[1] *See, Price* v. *Johnston*, 334 U.S. 266 (1948); *Sostre* v. *McGinnis*, 334 F.2d 906, 980 (2d Cir. 1964), *cert. denied*, 379 U.S. 892 (1964); *Fortune Society* v. *McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970); *Carothers* v. *Follette*, 314 F. Supp. 1014, 1023-24 (S.D.N.Y. 1970).

In *Sobell* v. *Reed*, 327 F. Supp. 1294 (S.D.N.Y. 1971), Judge Frankel of this Court Stated:

> "Whatever may once have been the case, it is not doubtful now that the Constitution, and notably the First Amendment, reaches inside prison walls. The freedoms of conscience, of thought and expression, like all the rest of life, are cramped and diluted for the inmate. But they exist to the fullest extent consistent with prison discipline, security and 'the punitive regimen of a prison. . . .'" at 1303.

[2] *Pierce* v. *LaVallee*, 293 F.2d 233, 235 (2d Cir. 1961); *Fortune Society* v. *McGinnis*, *supra* at 904; *Sobell* v. *Reed*, *supra*; *Goodwin* v. *Oswald*, 462 F.2d 1237, 1241 (2d Cir. 1972) and cases cited at 1241, 1242.

[3] *See, e.g., McCloskey* v. *State of Maryland*, 337 F.2d 72 (4th Cir. 1964); *Roberts* v. *Pepersack*, 256 F. Supp. 415 (D. Md. 1966); *Sostre* v. *McGinnis*, *supra*.

[4] *See, e.g., McCloskey* v. *State of Maryland*, *supra* at 74.

[5] *Landman* v. *Royster*, 333 F. Supp. 621 (E.D. Va. 1971),

> "The Court concludes, therefore, that the existence of some reasonably definite rule is a prerequisite to prison discipline of any substantial sort." (at 656)

[6] "In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions." *Sostre* v. *McGinnis*, 442 F.2d at 198.

[7] See the cases cited in *Sostre*, 442 F.2d at 198-199.

[8] This issue was raised but not decided in *Goodwin* v. *Oswald*, 462 F.2d 1237 (2d Cir. 1972). In a concurring opinion Oakes, J. expressed the view that nothing in the constitutional or statutory law forbids such activity (at 1245) but the decision itself was based upon the well-established protection of inmates' correspondence with their attorneys.

Appendix D

Decision of District Court, dated July 31, 1972.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JAMES NEWKIRK and CORNELIUS LUCAS,

Plaintiffs,

against

HAROLD N. BUTLER, Superintendent of Wallkill Correctional Facility, and PETER PREISER, Commissioner of Correctional Services,

Defendants.

To grant plaintiffs the relief which they seek on this motion for a preliminary injunction would give them substantially everything which they could obtain if they were successful after a trial. Defendants' opposing affidavits raise a serious question as to whether plaintiffs are entitled to this relief. Plaintiffs have not at this point demonstrated that there is a strong likelihood of their ultimate success. Moreover, the injury that plaintiffs will suffer in remaining at their present prisons pending trial, while no doubt "irreparable" in the sense that they cannot live the next few months over again, does not impress me as being severe. On the other hand, to require respondents to retransfer plaintiffs at this time might well be injurious to security at Wallkill and perhaps even injurious to plaintiffs themselves.

The court is satisfied that the best way to determine the issues in this case is to bring it on for trial as promptly

as possible. In the exercise of the court's discretion, plaintiffs' motion for a preliminary injunction is denied. Counsel are requested to meet with the court in Room 2001 at 2:00 P.M. on Wednesday, September 6, 1972 to fix a date for trial.

So ordered.

Dated: July 31, 1972

/s/ EDWARD C. MCLEAN
U.S.D.J.

Supreme Court, U. S.
FILED
DEC 11 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

No. 74-107

PETER PREISER, Commissioner of Correctional Services of New York State, and HAROLD N. BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

against

JAMES NEWKIRK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Certiorari Filed August 12, 1974,
Certiorari Granted October 21, 1974.

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CIVIL DOCKET
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Judge Ward

72 CIV. 2851

JAMES NEWKIRK, CARL OLIVER, CORNELIUS LUCAS,

Plaintiffs,

against

HAROLD N. BUTLER, Superintendent of Walkill Correctional Facility, and RUSSELL G. OSWALD, Commissioner of Correctional Services,

Defendants.

July 5, 1972	Filed Complaint & Issued Summons
July 13, 1972	Filed Amended Complaint
August 1, 1972	Filed Order to Show Cause re: Prelim. Injunction Returnable 7/14/72 before McClean, D.J.
August 1, 1972	Filed MEMO. END. on show caused filed this day. Plaintiffs' motion for a prelim. injunction is denied. Counsel are requested to meet with the Court on 9/6/72 to fix a date for trial.
September 15, 1972	Filed Answer
November 21, 1972	Filed Answer of Defendants to Amended Complaint

Relevant Docket Entries—District Court.

November 27, 1972	Before Ward, J. Trial Begun—Non-jury
November 28, 1972	Trial continued and concluded Decision Reserved . . . Plaintiffs' motion to dismiss action as to Rodriguez & Oliver granted.
March 22, 1973	Filed Notice of Motion returnable 4/3/73 re: dismiss complaint.
April 10, 1973	Filed plaintiffs' memorandum and affidavit in opposition to defendants' motion to dismiss complaint on grounds of mootness.
October 9, 1973	Filed OPINION #39,889—Declaratory relief is granted and injunction ordering the return of the prisoners to Wallkill is dismissed as moot and the injunction against future summary transfer is dismissed because in the present posture of the case there is not a sufficiently delineated controversy to merit its adjudication—The foregoing constitutes the findings of fact and conclusions of law of the court for the purposes of Rule 52, F.R.C.P. Settle Judgement on Notice—Ward, J.
October 26, 1973	Filed JUDGMENT—Action is dismissed as to plaintiff C. Lucas. Plaintiff Newkirk's interest in continuing to be situated at Wallkill is sufficiently great that transfer in direct response to his activity deserves some sort of

Relevant Docket Entries—District Court.

	due process at the very least the knowledge that it is a possibility—Ward J.—Judgment entered—Clerk.
November 20, 1973	Filed defendants' notice of appeal from decision dated 10/9/73 and Final Judgment dated 10/26/73
December 27, 1973	Certified Record to the United States Court of Appeals.

Relevant Docket Entries—Court of Appeals.

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 73-2853

JAMES NEWKIRK,
Plaintiff-Appellee,

against

HAROLD N. BUTLER, Et Ano.,
Defendants-Appellants.

11-23-73	Filed copy of docket entries and notice of appeal
12-27-73	Filed record (original papers of district court)
3- 7-74	Filed Appellants' brief, appendix and exhibits
4-29-74	Filed Appellees' brief and exhibits
5- 9-74	Argument heard by Anderson, Feinberg and Mansfield, CJJ.
6- 3-74	Judgment affirmed with modification, Mansfield, C.J.
6- 3-74	Filed Judgment
7-10-74	Issued Mandate (opinion and judgment)
7-24-74	Original record returned to district court
7-26-74	Filed receipt of return of original record to district court
8-19-74	Filed notice of filing of petition for writ of certiorari (SC #74-107)

Testimony at Trial of Respondent James Newkirk [Trial Minutes, pp. 98-167].

* * * * * *

JAMES NEWKIRK, JR., one of the plaintiffs, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. Pachoda:

Q. Mr. Newkirk, how old are you? A. I am 35 years of age.

Q. When did you first enter the New York State prison system, this last time? A. I came into detention in 1961, November 4th.

Q. When was the conviction in your case? A. November 4, 1962.

Q. Did you plead guilty? A. Yes, I did.

Q. What charge was that? A. Murder in the second degree.

Q. What sentence did you receive? (99) A. 20 to life.

Q. How far on the outside have you gone in school? A. In the 10th grade.

Q. When did you first enter one of the state prisons? A. March 15, 1962.

Q. When did you first apply for the Wallkill Correctional Facility? A. I think it was roughly around 1965.

Q. Prior to that how many of the other state institutions, if you recall, had you been in? A. I had been in Sing Sing, and Green Haven, Green Haven, where I applied for transfer to Wallkill.

Q. How did you hear about the Wallkill Correctional Facility? A. I first heard about it when I first came through Sing Sing orientation.

Q. Why did you apply to enter Wallkill? A. Because I was informed at that time there was a possibility I could learn other trades that wasn't available to me in the other max institutons.

Q. What happened when you applied in 1965? A. At the time I applied I think I spoke with Mr. Sheehy, I think was the name, who was the superintendent of Wallkill.

(100) The Court: Could we have that name spelled, for the record?

Mr. Butler: S-h-e-e-h-y.

The Court: Mr. Sheehy?

Mr. Butler: Mr. John Sheehy.

The Court: Thank you.

Q. Do you recall what the conversation was with Mr. Sheehy? A. Yes, I do. At that time he informed me I had too much time. They only took people that had a certain amount of time before going to the Parole Board, and I think in his calculation I had too much time at that time, which was somewhere in the area of 25 years.

Q. When do you appear before the Parole Board? A. 1975.

Q. That will be the first time you appear before the Board? A. Yes, that is correct.

Q. Did Mr. Sheehy indicate that your record was acceptable or not acceptable for Wallkill, at the other institution? A. He pointed out that I was acceptable but with one stipulation, that I had too much time at that time, but my institution record and everything else aside from that, I (101) would be accepted at a later time if there was nothing against my conduct in other institutions.

Q. Did you see Mr. Sheehy on other occasions? A. Yes, numerous times.

Q. Where was this? A. At Green Haven.

Q. Mr. Sheehy would come to Green Haven and talk to you? A. Yes. Every time he came, he would call me down. I didn't have to put down for the interview.

Q. You were on the list who applied to get into Wallkill? A. Yes.

Q. At some point did you leave Green Haven? A. Yes.

Q. When? A. 1968.

Q. Where did you go? A. Auburn.

Q. What were you told at Green Haven about your transfer to Auburn? A. I was told that if I was to wait at Green Haven for a couple of years I could take a transfer to Auburn and perhaps pursue a trade there, something that I had been (102) doing on the outside, that I could get into it again there. I told them I would accept that.

Q. Did they indicate the possibility after that period of time you would be acceptable at Wallkill? A. Yes.

Q. What did they say with the trade you would be able to pursue at Auburn? A. They said I would be able to get it there. I had a wish to pursue auto mechanics.

Q. Prior to entering prison, had you worked as an auto mechanic or with cars? A. Yes, I worked with cars.

Q. Had you done that for a number of years? A. I did it ever since I was a certain age. My father was a mechanic and I was always around cars.

Q. Was it stated to you that at Auburn you would be able to work as an auto mechanic? A. Yes.

Q. When you arrived at Auburn, what happened? A. When I first went in there I was asked what I wished to do while I was there. I reinstated myself on my intention on getting into auto mechanics, and at that time they put me into idle and I stayed in there for, perhaps, two months, roughly, and then I was put into the (103) mess hall, and then I went through another waiting period, at which time I had appealed to the school to try to get into a program. By appealing to the school, I was allowed to take vocational, the schooling, that is, classes and what not, and then at a later date, by further appealing, I got into

the auto mechanics, but not the auto mechanics, but into the body part.

Q. While at Auburn you never really got into the auto mechanics? A. No.

Q. When did you finally enter Wallkill? A. April 15, 1971.

Q. You remained at Wallkill until when? A. June 8, 1972.

Q. On that date was the transfer made to Clinton? A. Yes.

The Court: That beginning date, Mr. Newkirk, was April 15, 1971? That is when you came to Wallkill?

The Witness: Yes, that is correct.

Q. I would like to ask you what interests that you have pursued or you plan to pursue are the primary ones in your life? A. The primary ones is truck driving, auto mechanics, anything dealing with automobiles, music, and things of (104) this nature, and my art work, painting.

Q. And what people in your life are you close to and plan to continue a relationship with? A. My immediate family and friends.

Q. Turning to the first one of these, were you able to pursue your interests in driving and in cars and auto mechanics while at Wallkill? A. Yes, I was.

Q. Could you describe to us what activities you were able to engage in at Wallkill in this area? A. At Wallkill I did auto mechanics for a while. Then I left that and went to truck driving.

Q. The first thing, when you did auto mechanics, under what circumstances was this? A. Under the vocation.

Q. It was a class? A. Yes, where they teach auto mechanics. That was a part of the school program.

Q. Did you have an instructor? A. Yes—as a matter of fact, two instructors.

Q. Was there a lesson each day? A. Yes. Each morning for about an hour or so we always had class on the different structure of the cars and the component parts of them.

(105) Q. Then would you work on cars as well? A. Yes. After class, that was the general idea, the ones that was qualified to have a car by themself or with someone less qualified would start work on the car and whatever the situation was, they were supposed to take care of that job.

Q. Were you qualified to work on a car by yourself? A. Yes, I was.

Q. Did you request to change that and drive a truck? A. Well, yes, I did. Prior to getting into the auto shop, I had decided to put down for my license, driver's license to drive, and I figured I would stay in the auto shop for a certain part of the time and then become a driver, if it was possible. So the time I was in the auto shop I took my test for the driver's license and got that.

Q. While you were in the vocational shop, were you also attending other classes? A. Yes. I took up math, English, history and science.

Q. These are high school level courses? A. Yes.

Q. Can you briefly describe what kind of truck you were driving and what jobs it entailed? A. Most of the trucks was Dodges, smaller trucks, (106) like pick-ups, and some of them was large dump trucks.

Q. Prior to entering prison you had worked as a driver? A. I used to drive a tractor-trailer on the outside.

Q. Who did you drive around? A. We used to take different gangs from one part of the institution property to another part. If the working gang—it was outside details.

Q. At times did you have to go outside the prison grounds? A. Sometimes we would be on the main highway.

Q. Was a guard with you when you made these trips? A. When you take out a gang you always use a guard or civilian or supervisor with a gang. But when I am coming back or going somewhere else to pick up a gang, usually no guard is with me.

Q. The guard is with you when they had to guard other inmates you were driving? A. Yes.

Q. There were times you would drive the truck alone? A. Yes.

Q. Were there any gates you had to go through as you drove along? A. No, there was no gates.

(107) Q. When you arrived at Clinton, what work did you do—strike that.

When you first arrived at Clinton, what did you do? A. When I first arrived at Clinton I was put in idle.

Q. What does that mean? A. Idle is where you don't do anything, but you can go out and eat, but you don't do any work.

Q. The periods you were not eating, where were you located? A. In a cell.

Q. Was the cell locked? A. Yes.

Q. What periods of time were you allowed out of that cell? A. I would say for about better than an hour.

Q. That was to eat? A. Yes.

Q. Were you allowed out for any other reasons? A. No.

Q. If you had to use the toilet facilities, how did you do that? A. In the cell.

Q. There is a toilet in the cell? A. Yes.

(108) Q. An open toilet? A. Yes.

Q. You did not have any recreation at that time? A. No. I was locked up.

Q. Were any other inmates allowed in your cell? A. No.

Q. How long did you remain in idle status? A. Well, from June 8th to July 11th, if I recall correctly—July 11th.

Q. That would be about four and a half weeks? A. Something like that.

Q. Did you request at any point during this time a specific assignment at Clinton? A. Yes. After I was there about two weeks I was called down to find out exactly what I wanted to do and informed of a program, and at that time I informed them I would like to drive or go into auto mechanics.

Q. You told them you were interested in doing auto mechanics or driving? A. Yes, that is correct.

Q. Then you went back and finished your idle status? A. Yes.

Q. What assignment did you get? A. Well, at a later date, I think it was roughly around (109) the 10th of July, I was called back down to this same assignment situation and I was then asked would I accept a job working at the superintendent's house.

Q. What did you do? A. I accepted the job.

Q. What do you have to do when you work in the superintendent's house? A. Well, housekeeping. That consists of waiting on people, waiting on the table, keeping the house clean and from time to time doing cooking for the superintendent and his Mrs.—just keeping the house clean, bathroom, turning the bed back—

Q. You work in the superintendent's house? A. Yes, that is correct.

Q. You have to clean the house? A. Yes.

Q. And make the beds in the house? A. Yes.

Q. Turn down the beds in the house? A. Yes.

Q. And serve the superintendent? A. Yes.

Q. When he has guests, you serve them too? A. That is correct.

(110) Q. Had you ever worked on this kind of work prior to entering prison? A. No.

Q. Do you have any desire to be a servant in a white man's house when you leave prison? A. None whatsoever.

Q. What time do you get up in the morning at Clinton Prison? A. About a quarter to 6.

Q. And what did you do? A. Get dressed and about 6 o'clock I am taken out of the cell, to the front part of the administration—

Q. How are you taken out of the cell? A. An officer comes and picks you up.

Q. Does he have to unlock your door? A. Well, the block officer unlocks your door, but at the end of the gallery there is another door which the officer has to unlock and he unlocks two doors and takes you part of the way and the officer has to unlock another door to get to the front part of the administration.

Q. You are escorted from door-to-door by one guard or another guard? A. Yes.

Q. You wait while the locked gate is opened? (111) A. Yes.

Q. And then another guard escorts you to the warden's house? A. Yes. You can be there about ten or fifteen minutes before another guard comes on to take you.

Q. What time do you arrive at the warden's house? A. Some officers get there at 6:30, some at ten minutes past six. So it really depends on which officer it is, but we are supposed to be there by 6:30, at the latest.

Q. Then you begin your chores? A. Yes.

Q. How long do you stay at the warden's house? A. To 7:30, and there are many times it is much later, and it depends on how many guests they have, if they have guests.

Q. That is until 7:30 p. m.? A. Yes.

Q. You eat all your meals in a room near that house? A. In a part of the garage. It is a little room attached to the garage where they keeps the cars and the cooking is done for the prisoners that work there.

Q. There is always a guard present when you eat those meals? A. Yes.

(112) Q. What happens when you finish work? A. When I finish work, we go back to the cells.

Q. How does that happen? A. As I said, at times it varies, anywhere from 7:30 on. It could be 8 o'clock, it could be 9. This depends on what is happening up there at that time.

Q. The earliest is 7:30 p. m.? A. Yes.

Q. Up until 9, possibly 9:30? A. Right. If it is just the superintendent and his wife and maybe a member of his family, his daughter or something, 7:30 is the time.

Q. Have they at any point indicated where you will be given your requested assignment doing auto work? A. No.

Q. You are escorted from the warden's house back to your cell by another guard? A. Yes.

Q. And you go through the same process of gates? A. Yes.

Q. At Wallkill did they have any gates of this nature? A. No.

Q. Are you escorted from place to place by a guard? A. Are you referring to Wallkill?

(113) Q. At Wallkill. A. No. You have the freedom to move around at Wallkill.

Q. And you had to report to your job assignment at Wallkill or were you able to do it on your own? A. You do it on your own.

Q. When you went anywhere at Wallkill, you could do it on your own? A. Yes.

Q. You also said you had an interest in music, I believe? A. Yes, that is correct.

Q. Were you able to engage in musical activities at Wallkill? A. Yes, I was.

Q. Can you describe what those were? A. Well, I practiced in the band—I played in the band, and other times when the band wasn't functioning I practiced on my own or with other inmates. We always had leisure time for practice in the afternoon.

Q. You played in a band? A. Yes.

Q. And you were able to practice where? A. Up in the band room.

(114) Q. What hours? A. From after 4 o'clock to 8, I think it was.

Q. After 4 p.m.? A. Yes.

Q. You were able to go on your own to the band room? A. Yes.

Q. And play with other people on your own? A. Yes.

Q. You could also practice by yourself? A. Yes.

Q. What instruments did you play in the band? A. Saxophone and clarinet, but guitar is really my instrument, but due to the fact they needed someone to play saxophone, I played saxophone.

Q. Whose instruments were these? A. The saxophone was the state and the clarinet was mine and the guitar was mine, and I had a base.

Q. Did the band also perform? A. Yes, sir. I was in two shows, one for Christmas and one for Easter. I performed in two shows while I was there.

Q. Were you able to pursue your music in other ways at Wallkill, did you listen to radio and records, for example? A. Yes. I think I had some records that I was able to (115) play from time to time. We had a record room that we could get on a sheet that was passed around every so often to each gallery that you sign up for to go to the record room, plus we had a record player up in the band room where the members of the band could play records on and listen to music.

Q. And this music—did you play in the choir? A. Yes, I sung in the choir.

Q. Did you practice with the choir? A. Yes.

Q. What time would this be? A. Some time in the afternoon and sometimes it would be after 6.

Q. Where did you play in the choir, Mr. Newkirk? A. Up in the chapel.

Q. When? A. Well, like on Sundays, on a Sunday, and I remember one time we did some numbers in the auditorium when we had guests.

Q. Guests that came from outside the prison? A. Yes. We had the gospel train from the five boroughs of New York at one time, which was roughly 50 people, and we was asked to do some numbers at that time in the auditorium.

(116) Q. Is this music very important to you? A. Yes, it is. It is a part of my life.

Q. Were you able to practice regularly at Wallkill? A. Yes.

Q. And play with other persons? A. Yes, that is correct.

Q. When you got to Clinton Prison, what happened to your records, for example? A. My records, I was told they wasn't allowed at Clinton and therefore I would have to give an address where they could be sent or they would be destroyed or give them to a charitable organization or something.

Q. What happened to the records? A. I end up sending them home.

Q. Did you pay for this? A. Yes.

Q. Have you been able to play the clarinet or saxophone at Clinton? A. No, I haven't.

Q. When you get back to your cell at Clinton at 7:30 or after in the evening, are you allowed to play music? A. No. Beginning at 7:30 p.m. it is a silent period until the next morning.

Q. So you can't play any music? (117) A. No.

Q. And you don't play in the band at Clinton? A. There is no band at Clinton.

Q. While at Wallkill had you developed relationships with other members of the band? A. Certainly I had.

Q. These are not available to you at Clinton? A. No.

Q. Talking about the afternoon period, could you indi-

cate at what period in the afternoon you were on your own time at Wallkill? A. It was starting after the count, roughly after 4 o'clock.

Q. Until what period would this last, until what time? A. 11 o'clock at night.

Q. During this period, what could you do? A. Most of my time I spent up in the band room, either that or up in the choir.

Q. What other activities were available during this period? A. Well, you had the gym was always open and, as I stated before, the record room was generally open.

Q. Was that an indoor gym? A. Yes.

(118) Q. Does Clinton have an indoor gym? A. No.

Q. Were you able to decide on your own which of these areas you would go to? A. Yes.

Q. You would go up to them on your own? A. Yes.

Q. Is there any period of the day at Clinton where inmates have a choice as to which area they may go to? A. No, not known to me.

Q. During this period at Wallkill, the doors to your room were open? A. Yes.

Q. In fact, are the doors to your rooms ever locked at Wallkill? A. No.

Q. So you can go in and out of the rooms at your own will? A. Yes.

Q. And you can have guests in your room? A. Yes. I think it is four people that is allowed to visit you at any given time.

Q. During this period from 4 p.m. to 11 p.m., inmates could congregate in each other's rooms? (119) A. Yes.

Q. They could just sit and talk? A. Yes.

Q. Or play checkers or chess or whatever? A. Yes.

Q. At Clinton Prison, are inmates allowed to go into each other's cells? A. No.

Q. And those periods when inmates are in the cells, the doors are locked? A. Yes, that is correct.

Q. Are there places, common places, at Clinton Prison where inmates can sit down and talk to each other? A. The only possible place they could sit down and talk would be in the yard, and then you would have to probably know someone to be able to do this, because due to the fact they have courts there where there are three or four guys on the court where they cook and what not and you can't walk up on somebody's court and want to sit down and start talking but you have to get permission from the individual who has the court to enter.

Q. Since you have been at Clinton have you engaged in informal discussions with groups of inmates? A. I have talked to a few.

(120) Q. Where would this be? A. Several times I have been in the yard and had an opportunity to talk to a few.

Q. Does your job, the hours you work, allow you to go to the yard during the week days? A. No.

Q. When you come back, yard is over? A. Yes.

Q. Do you work seven days a week? A. Yes, I do.

Q. On Saturdays and Sundays, is it a full day? A. On Saturdays and Sundays, sometimes we are able to go into the movie, and then it depends on if something is happening that requests our presense at the house.

Q. It is possible to work full days on Saturdays and Sundays as well? A. Yes, it is possible.

Q. You also mentioned painting. You are able to engage in this activity at Wallkill? A. Yes, I did oil painting there, stone work and also glass work.

Q. What is stone work and glass work? A. Stone work is a form of gravel that you use to make different things, such as faces or animals, you know, trees, (121) the same technique involved as in oil, try to get the same impression, but you use stone to do it.

James Newkirk, Jr.—Plaintiff—Direct.

Q. You made a number of these faces while at Wallkill? A. Yes.

Q. Where did you get the materials for this? A. We had a hobby shop there and we could buy all the materials we needed for these different programs that was involved here as far as art.

Q. Were there other materials available there besides paints? A. There was woodwork, if you wanted to make lamps, they had fixtures you could buy, and there was numerous things you could do there. You had all the equipment for cutting wood if you wanted to do hobby work, woodwork, and the machine was available for you to use to cut the wood after the 4 o'clock count. You could make little chests and pianos and you had the privilege of doing so.

Q. Were you able to do this in your room? A. I never did no woodwork. I did the glass work, and stone work, and painting, and I did that in my room.

Q. You could do that in your room? A. Yes.

Q. Have you been able to do any painting while at Clinton? (122) A. No.

Q. Have you been able to do any stone work or glass work while at Clinton Prison? A. No, I haven't.

Q. You talked about your room a lot. Perhaps you could describe briefly what other things are in your room, what pieces of furniture? A. At Wallkill?

Q. Yes. A. Well, a bed, you had a large cabinet where you could keep your belongings stowed, you had a table there, and you could add other things to make it more comfortable. You had your own little heaters in your room.

Q. In each room? A. Yes.

Q. Were you able to bring in other items of your own? A. Yes, such as lamps and things.

Q. Did you bring in any items? A. Yes, I had a lamp.

Jams Newkirk, Jr.—Plaintiff—Direct.

Q. At Clinton have you been able to bring any items into your cell besides the furniture they provide? A. No.

Q. Did you have a typewriter in your room? A. Yes, a Royal 440.

(123) Q. Were you able to type in your room? A. Yes.

Q. What did you work on in your room? A. Basic legal work and research work on history and law, some form of law.

Q. When you got to Clinton, what did they tell you about your typewriter? A. I wasn't allowed to have it there.

Q. What did they say had to be done with it? A. I would have to send it home.

Q. How did that happen? A. First I had to fill out a form at the package room. The package room does all the sending out there, shipping and receiving. So I gave them a name and they okayed to send it after they asserted I had money to pay for the postage and it was then packed and sent out by them.

Q. What happened to the typewriter? A. I sent it to my friend and when he got it, it was all broke up.

Q. Where is the bathroom located at Wallkill? A. At the end of the hall.

Q. At Clinton there is a toilet in your room? A. Yes.

Q. When may you use the bathroom at Wallkill? (124) A. Any time you want to use it.

Q. Is there any limit on the number of showers you may take? A. No.

Q. Are there times that you can use hot water? A. No.

Q. Do you have hot water at your room in Clinton? A. No.

Q. How do you get hot water in Clinton? A. There is only one way you can get it, and that is in between your afternoon meal at the time you go to the mess hall, you bring out your pail and leave it by the front and they have a man to fill up the pail during the time you are in the mess hall.

Q. Where is the pail left? A. As you come back, going into your respective gallery, you pick up your pail and take it back to your cell with you.

Q. That is the only time during the day you get hot water? A. Yes.

Q. How many showers a week do you get? A. One shower.

Q. Is there an outside wall at Wallkill? (125) A. Yes.

Q. At Wallkill? A. Excuse me, I am sorry. No, there is no wall at Wallkill.

Q. Is there a wall at Clinton? A. Yes.

Q. Can you see over the wall? A. The only thing you can see is the sky and possibly the tops of some houses.

Q. At Clinton you don't see anything that is outside the prison except the sky? A. Yes.

Q. What is the situation at Wallkill? A. You can see all your surroundings there, because it is all open.

Q. What kinds of things can you see? A. Houses, the land, the woods, this type of thing, a few roads.

Q. How does this affect you? A. Well, to me, this gives you more of a freedom of feeling as towards like being outside. This keeps you more in contact with the outside reality, society.

Q. At Wallkill do you also see people not from the prison, from the outside? (126) A. Yes.

Q. What types of people might come to Wallkill from the outside? A. Well, you would see visitors, people that is coming in to visit the institution. There is time to time you have the high school kids coming in there. They come in quite frequently, visit the institution.

Q. Did you yourself receive visits while at Wallkill? A. Yes.

Q. From whom? A. I received visits from my sister, two of my sisters, my son and my friend.

Q. Where do these people live? A. Brooklyn. My sister

live in New York and my friend live in Coram, Long Island.

Q. Were you able to make phone calls while at Wallkill? A. Yes.

Q. How often was that? A. Once every two weeks.

Q. Who did you call? A. I called my mother-in-law down South, North Carolina. I called her. My sister. And my friend was on my phone list.

(127) Q. How often did you receive visits, approximately, while you were at Wallkill? A. About once a month.

Q. Have you received any visits since you have been to Clinton? A. No, I haven't.

Q. Have you been able to make any phone calls since you have been to Clinton? A. No.

Q. Have you had any contact with anybody except prisoners and other inmates while you have been at Clinton? A. No.

Q. How has this affected you? A. This is a very depressing situation. I have been in prison ever since I have been there, because I have had a lot of difficulty in my writing and trying to communicate with my family through writing. I find there is an arrears in writing due to the fact that the people that did my correspondence at Wallkill—at Clinton most of the letters came back saying the people was not on the correspondence list and I had to go through the procedures to get them on the correspondence and I asked why they have not because they were on the list in all the other institutions I was in, and this took time, going through (128) these procedures, to get them to decide whether they was going to put them on there. I even brought up the fact that I felt that due to the fact that I had correspondence with these people prior to coming to Clinton, that the same records should be available there and I would be allowed to communicate

with these same people, due to the fact they have been checked, and on most occasions I had to go to the service unit to get this straightened out. At one point it got so bad I had to take it up with the superintendent to get my daughter on the list, my oldest daughter, who is 14.

Q. Would you say that the general facilities and atmosphere at Clinton is similar to the other maximum security institutions you have been in? A. It is similar, yes.

Q. Is it similar to the general facilities and atmosphere at Wallkill? A. No. There is a lot of difference between Wallkill and Clinton.

Q. How do these differences, from your observations, affect the people at Wallkill and the people at Clinton, the inmates.

Mr. Hoffman: Your Honor, I object to that question. That is testifying to the state of mind of other people.

(129) The Court: I will ask counsel to rephrase the question. The objection is sustained. The question should be put to the witness in a more acceptable form.

Q. How was the relationships you had with the correctional officials at Wallkill? A. I would say I had a good relationship with the officials there. I never had any trouble with anyone. I aways got along.

Q. And you were able to freely talk with these men? A. Yes, that is correct, at any given time.

Q. Was there tension between you and these persons at Wallkill? A. There wasn't any tension between me and the officials there.

Q. How does this compare to the relationship between the guards at Clinton? A. At Clinton it is a whole different thing. You didn't have that much relationship with officers there. You are herded up and rushed around to

the places you are going and the officers have nothing to say to you. You are just notified you are going to a certain area about something and you are carried there by an officer. The only one you come in contact with would be the individuals that you work under, such as the supervisor, which could be a civilian or (130) an officer.

Q. You would say the basic relationship between the inmates at Clinton is where the guard is escorting and watching inmates when they go from one place to another? A. Yes.

Q. And this is not the case at Wallkill? A. No.

Q. Did you have any disciplinary difficulties at Wallkill? A. No.

Q. Were you ever spoken to by any of the officials at Wallkill about your behavior? A. No.

Q. Were you ever counselled or warned by anyone? A. No.

Q. You were participating fully in the activities at Wallkill? A. Yes.

Q. Did you plan to stay at Wallkill—you were hoping to stay at Wallkill? A. Yes, I had hoped to stay at Wallkill.

Q. When did you first hear about the concept of an inmate's labor union? A. Somewhere around the last of May.

(131) The Court: Of this year, 1972?

The Witness: Yes, that is correct?

Q. Prior to this had you had any general knowledge about inmates' labor unions at any of the prisons? A. Yes. I had read it in numerous papers, Time Magazine, or the Times paper, one, or perhaps the Daily News.

Q. What did you read? A. I read about the organization over there at Green Haven, the labor union situation there.

Q. And what did you know about it? A. I knew they had one there in progress, that they had a petition passed and it had been signed by certain of the inmates and it was being taken up outside—with outside labor people who was handling the situation.

Q. The first time you heard about it at Wallkill was the end of May? A. Yes.

Q. Could you describe how that came about? A. Well, at the time I heard up there, this Martin came to me with the labor union form and he showed it to me and asked me did I think I would be interested in signing for the labor union to be at Wallkill.

Q. Who was this? A. Martin Sostre. So I took it and read it and after (132) reading it, I told him I did think it was beneficial.

Q. I show you Plaintiffs' Exhibit 15 and ask you if you have seen that before? A. Yes, I saw this before.

Q. I show you page 3. Is that your signature? A. Yes, it is, that is correct.

Q. Was this the form that you were speaking about that Mr. Sostre showed you? A. Yes.

Q. Is that your name on the 7th line of that form? A. Yes.

Q. And you believe you signed it in that date that is next to your name? A. Yes.

Mr. Pochoda: There are 9 other names on this form, your Honor, and I would like to read it for the record: Martin Sostre, 9273, date, 5/31/72; Charles Kenny, No. 9372, 5/31/72; Claudio Arzuaga, No. 9971, 5/31/72, Allen S. Weinfeld, 9586, 5/31/72, Cornelius Lucas, 9659, 5/31/72, Coy Smith, 9848, 5/31/72; Edwardo Rosado, 9748, 5/31/72; J.J. Newkirk, 9704, 5/31/72; Michael Williams, 9723, 6/1/72.

This document is the constitution of the prisoners labor union at Wallkill and begins, "The undersigned, (133)

desiring peacefully, lawfully and effectively to air just grievances and present legitimate demands to the prison administration, the legislatures of this state and of the United States, and the public at large hereby form the prisoners' labor union at Wallkill with the following constitution." And I will read one section:

"2. General Principles and Purposes. Believing that prisons are not islands of exile, but an integral part of this society; believing that prisoners are human beings and retain their human rights and social responsibilities, and believing that prison labor is part of labor in general and consequently part of the general economy, the union has the following purposes: To seek through peaceful and lawful means, A, to improve the conditions of its members; B, to equalize to the fullest extent possible the rights, privileges, and protection of prison labor with those of free labor everywhere; C, to advance the economic, political, social and cultural interests of the prisoners at Wallkill; D, to aid in adoption of laws and to ask your compliance with existing laws, local, national and international, for the economic, political and social welfare of all prisoners, and, E, to do anything and act incidental to or connected with the following purpose."

(134) Q. On that date did you sign any other documents? A. No.

Q. Did you think that the inmate union idea was a good one? A. Yes, I did.

Q. Did you think it might help your conditions while in prison? A. Definitely I feel it would help the conditions, to make more money. Everyone needs more money.

Q. What was your wage per day while at Wallkill? A. My first wage was 25 cents per day.

Q. And then? A. When I reached the point of driving a truck, it then became 55 cents a day.

Q. After this discussion with Mr. Sostre, when was the

next time you spoke to anyone at Wallkill about a union at Wallkill? A. I think the next time I said anything to anyone was on June 2nd.

Q. And when was that? A. I was approached by Martin Sostre somewhere around my cell area—I don't recall if it was in my cell or outside the cell—

Q. Do you recall approximately what time this was? (135) A. I believe it was in the afternoon.

Q. After 4? A. I would say after 4.

Q. What was said at that time? A. At that time he told me—he showed me the forms for the petition for signature and he asked me would I sign and pass it on to someone else.

Q. What did you say? A. I told him I would.

Q. What did you do? A. I didn't sign it then. I put it in my cell and then I went on to band practice and after I came back from band practice, which was around the 6 o'clock count, while I was in the cell for the count, I signed it and then I passed it on.

Q. Do you recall who you gave it to? A. No.

Q. After you passed it on, do you know what happened to it? A. Well, I passed it on and told the last one to give it back to Martin Sostre.

Q. After you passed it on, was that the last time you physically handled that petition? A. Yes, sir.

(136) Q. What did you do then, after you signed it? A. After I signed it, I went back to the band room.

Q. And did what? A. Practiced music.

Q. When you had passed this petition on to the next person, did you mention the Liaison Committee? A. No, I didn't, at no time.

Q. Was there any argument of any sort involved when you passed this petition onto the next person? A. No, sir.

Q. Did you attempt to hide this passing of the form on? A. No, I didn't.

Q. This was done out in the open? A. Yes.

Q. After you went to the band room, what did you do? A. Well, you come back down for the 8 o'clock count, I think it is, and after that I don't recall what I did. I don't know if I watched television or went somewhere in the institution.

Q. At some point did you hear an announcement over the PA system? A. Later I did hear an announcement. I was up on the third floor watching television.

(137) Q. What did you hear? A. I heard Barnes on the PA system, which when I heard it I didn't recognize his voice, but I hear someone say it was him.

Q. Who was that? A. Barnes.

Q. Who was he? A. A member of the Liaison Committee. Exactly what position he held, I don't know.

Q. He is an inmate? A. Yes.

Q. What did you hear? A. I heard him say that the Liaison Committee had not sanctioned the labor union petition, they had no part of it and anyone who wished to discuss it with the Liaison Committee could meet at the key room.

Q. What was your reaction to that? A. I was surprised because I had never known of any inmate to be on the PA system. This is what surprised me most.

Q. What did you do after hearing this announcement? A. I continued watching the TV.

Q. Were you concerned about the announcement? A. Yes, it concerned me.

(138) Q. In what way? A. Well, I felt that maybe some people would feel bad, but me personally it didn't make me feel bad about it.

Q. You were not worried? A. No.

Q. What did you do for the rest of the night? A. After I finished watching TV, I went back to my cell.

Q. Did you have further discussion during that night

or any discussions with people about an inmates' labor union? A. No.

Q. Did you get involved in any arguments of any sort? A. No, I didn't.

Q. Or fights of any sort? A. No, I wasn't in any fights.

Q. Did you feel threatened in any way? A. No.

Q. Did you threaten anybody else in any way? A. No, I didn't.

Q. Were you spoken to by an officer at any time during that evening? A. No, I wasn't.

(139) Q. On Saturday, the next day, were you involved with the union authorization form at all? A. What day would that be?

Q. The next day, Saturday. A. No, I didn't have no contact with that.

Q. On any day between that Saturday, June 3rd, until you were transferred were you involved or did you even handle at all one of the union authorization forms? A. No.

Q. What were you doing on Saturday, June 3rd? A. I think, if my recollection serves me correctly, I think I was working on Saturday.

Q. Were you performing your usual job? A. Well, once out of every month the truck drivers has a turn at moving the garbage from the institution, which consists of Saturday and Sunday, and I think I was doing that on that particular day.

Q. For the rest of the week, what were you doing? A. Driving a truck.

Q. Again you would drive in and out of the institution? A. Yes.

Q. And at times there would be no guard present? A. That's right.

Q. Was your routine changed in any way during (140) that week as opposed to the week prior to June 2nd? A. No.

Q. Did a corrections officer or any official at Wallkill speak to you before the union authorization form or the union at Wallkill? A. No.

Q. Did you get into any arguments with any other inmates about the union at Wallkill? A. No, I didn't.

Q. Did you get into any arguments about the Liaison Committee at Wallkill? A. No.

Q. Did you feel threatened in any way while you were there? A. No.

Q. Did you yourself threaten anybody? A. No.

Q. Did you have even any heated discussions with anyone on the Liaison Committee? A. No.

Q. Or with any other inmates? A. No.

Q. During that week were you also going about your usual routine after 4 p.m.? (141) A. Yes.

Q. You were going to band practice? A. Yes.

Q. And choir practice? A. Yes.

Q. And painting? A. Yes.

Q. And typing? A. Yes.

Q. And your room remained unlocked? A. That is correct.

Q. You were not brought up on any disciplinary charges? A. No, I wasn't.

Q. At some point, I take it, this routine was interrupted. Could you describe when this happened? A. That was June 8th.

Q. What happened? A. On the morning of June 8th, I had started my usual procedure in driving and I had picked up a group of inmates and their supervisor and I was to deliver them, at which time we had stopped at the carpenter shop to pick up a tool they was taking with them for their work and just as I was ready to proceed on into the trip, I was called over the loudspeaker to come in, that I was wanted at the platform.

(142) So I pulled the truck in close to the platform

and stopped and got out and proceeded in to find out what it was they wanted, and at that time I was informed by the officer that I worked for that I was wanted at the hospital.

I told him okay and asked him "Do you want to move the truck?"

And he said, "No, somebody else will move it. You don't have to worry about that."

I gave him the keys and left the truck and proceeded to the hospital.

Just as I was maybe ten or fifteen feet away I noticed two officers was trailing me. So I continued on to the hospital.

At one point I asked them what was happening and they just said I was wanted at the hospital. So I went on to the hospital and when I got there I was taken into a small room, where I found one other inmate sitting there. I was asked to sit down.

I sat down and perhaps waited for maybe a half hour and then I saw my personal belongings being brought to this room by these same officers that had brought me up there.

So I inquired why was my belongings being put up and they said I was on the draft.

Q. What does that mean? (143) A. That means being transferred.

Q. Did they tell you why? A. No.

Q. Did they tell you where you were going? A. No.

Q. Then what happened? A. Well, I just finished packing up and sat there and waited until they got ready to leave.

Q. Did you have a visit that day? A. I am told by my sister that she arrived there shortly after we left that morning, Mary Maulsby.

Q. And you were not able to see her? A. No.

Q. Where were you taken? A. To Clinton Correctional Facility.

Q. How do you feel about this action? A. I feel deeply depressed because I have been deprived of quite a few things I had access to there, including visits from my family, the freedom that you have there to move around and the functioning under a different situation.

The whole circumstance is much different because there is more freedom involved. The environment there creates the move for the people there—by being free (144) to move it keeps the people a more happy inner feeling there and in this respect I felt better there than I would feel up here, in Clinton, because there is a deeply depressed situation.

Q. Do you know why you were transferred? A. No, I never did find out why I was transferred.

Q. Can you think of any activity you did at Wallkill that would call for a transfer? A. No.

Q. You spoke about June 2nd and you said you were given a form and passed it on to another inmate. I ask you to look at this particular paper, Plaintiffs' Exhibit 4 in evidence (handing). A. Yes, this is a copy similar to the one I saw.

Q. And you put your name on there? A. I signed it.

Q. And then passed it on? A. Yes.

Q. If you had known about a rule that prohibited the passing of any forms, would you have done so?

Mr. Hoffman: Your Honor, I object. That is a speculative question.

The Court: Sustained.

Mr. Pochoda: No further questions, your Honor.

(145) The Court: Mr. Hoffman.

Cross Examination by Mr. Hoffman:

Q. You were transferred from Sing Sing to Attica? A. Yes.

Q. Was it easier or more difficult for your family to visit you when you were transferred from Sing Sing to Attica? A. When I was in Attica, I didn't get any visits.

Q. And then you were subsequently transferred from Attica to Green Haven? A. Yes.

Q. Was it easier or more difficult to receive visits at Green Haven than it was at Attica? A. Green Haven is where I received the visits. I didn't receive any at Attica at all.

Q. You were subsequently transferred from Green Haven to Auburn, is that correct? A. Yes.

Q. Was it easier or more difficult to receive visits at Auburn than it was at Green Haven? A. It was more difficult, because I only received one visit while in Attica, and that was from my friend.

Q. Was it also more difficult to receive visits at (146) Auburn? A. Yes, it was difficult there. That is the place I received the one visit at.

Q. Did you protest your transfer from Green Haven to Auburn? A. No, I didn't, because, the reason I didn't, was because I wanted to become involved in something related to my life's activity outside. So in order to get to Wallkill, this seemed like to be the main route, to go by Auburn and start working from there and do a couple of years or so and then work my way back to Wallkill.

So to be able to help me in society, I accepted going to Auburn knowing that I wouldn't be able to get visits there.

Q. So that your transfer to Auburn was in part due to your own request? A. Yes.

Q. Were you deeply depressed when you arrived at Auburn? A. No.

Q. Were you deeply depressed about not being able to receive visits at Auburn? A. Well, I had the feeling I wouldn't receive that many visits at Auburn.

(147) Q. What type of work did you do with the body shop? A. epair cars that had been damaged.

Q. Did y u enjoy this work? A. Yes, I enjoy doing this type o work.

Q. Were ou compensated for this work? A. 10 cents a day, I th k it was.

Q. When ou were first transferred to Wallkill, what was your f st assignment at Wallkill? A. My first assignment th e was porter.

Q. A por ? A. Yes.

Q. And a er your assignment as a porter, what was your next signment? A. My next assignment was to haul garba work on the garbage truck—not to drive it but to work n it.

Q. Were u also not assigned to the rear gate at Wallkill? A. I as assigned to the rear gate at the time I was on the g bage truck.

Q. What ducational courses were you taking at Auburn? A. th, English, science.

Q. What ucational courses were you taking at Wallkill? A. I k the same thing there, English, math and (148) scienc

The ourt: Mr. Hoffman, my notes reflect that Mr. wkirk went from Sing Sing to Attica, and I not you have been questioning him on Auburn and I nt to follow this through, so that I am clear. I have at Sing Sing to Attica to Green Haven.

Mr. offman: That is correct, your Honor. Then Green aven to Auburn and then Auburn to Wallkill.

The ourt: Thank you.

Q. So that ou were receiving educational courses both at Auburn a Wallkill? A. Yes.

Q. Have you requested any educational courses at Clinton? A. No, I haven't. I requested the automotive field and the driving.

Q. That is the only thing you have requested so far? A. Yes.

Q. Has anyone forced you to work in the superintendent's house? A. I was only asked would I work there and I am not one for turning down a job, due to the fact that I was asked.

Q. Are you compensated for working there? A. Yes.

(149) Q. Where is the superintendent's house located? Is it outside the walls? A. Yes, it is.

Q. How many days per week do you go there? A. 7.

Q. You testified before that when you're within Clinton Prison all you can see is the sky. Is this true when you go to the superintendent's house? A. Well, you can see your surroundings there, the houses there, such as there is.

The Court: Perhaps this is a good time for us to take our mid-afternoon break. I can tell counsel that we will resume again at 3:30, which is in about ten minutes, and we will continue until 4:30.

(Recess.)

By Mr. Hoffman:

Q. Mr. Newkirk, as you walked down the road from the prison to the superintendent's house, what are you able to observe? A. Walk down the road? I never said anything about walking down the road. You go by car.

Q. What are you able to observe as you make the trip? A. You see a few houses, officials' houses along the roadway.

(150) Q. When you work at the superintendent's house do you work only inside the house? A. I work inside and

there are times I would be doing something outside, such as times I have to pack his car or camper, bring materials from the inside of the house to the outside.

Q. Are there other occasions when you work outside the house? A. That's just about it.

Q. How many men work at the superintendent's house? A. At this time there is only three.

Q. Do you men have occasion to go into town? A. Go into town? No.

The Court: May I inquire: Where is the superintendent's house? Is it on the prison grounds in some way or is it in toward the town?

A. I am not certain about this, but I think it is part of the prison property, because it is just a little ways up from the wall. There are numerous houses as you go alongside this road we take going up there. So I think this is part of the state property there.

The Court: But it is beyond the main wall of the prison?

The Witness: Yes.

(151) By Mr. Hoffman:

Q. Do people from the outside visit the superintendent's house? A. Yes, there be people there from time to time.

Q. Upon occasion have you spoken to them or have they spoken to you? A. They says, come in—it is a general thing, they speak to people.

Q. You are permitted to have conversations with people who come into the superintendent's house? A. Most of the time there is no conversation. If he is having guests for lunch and dinner, all I do is wait on them and serve them.

Q. Have you renewed your request to do auto work at Clinton? A. No, I haven't.

Q. When was your request made? A. It was made in June.

Q. And you have made no further requests since that time? A. No, because I was told at that time, it was like a long, drawn out affair waiting and it took time to get around to it. So I assume that I am still on the waiting list.

Q. How much are you compensated for working at the (152) superintendent's house? A. I started off with 30 cents and after being there approximately two months, I was moved to 55 cents.

Q. When you were a hall porter at Wallkill, how much were you compensated? A. 25 cents.

Q. Have you requested the superintendent at Clinton to allow you to make any phone calls? A. Yes, I put down for the phone call—they passed out the sheets and I came in one night and there was a sheet in my cell and I filled it out and put down the name of the people I called prior to coming there, and I have not heard anything since then.

Q. Have you put in a tab to the superintendent on that? A. Yes. As a matter of fact, the form came back to me stating I had to put the phone numbers on it, and I sent a request back stating that I didn't have the phone number and I had been on a phone list prior to coming there and perhaps the phone numbers would be on there.

Q. Have you made efforts to obtain these phone numbers from your relatives? A. I have wrote a couple of them.

Q. Have you attempted to establish any friendships at Clinton? (153) A. I know a few people there that I have met down through the years, from one institution or another, you know.

Q. Are you friendly with the men you work with every day? A. Yes, I get along with the people I work with.

Q. When you were transferred to Clinton, were you ever put in segregation? A. I was put in idle.

Q. But you were not put in segregation? A. I know segregation is a part that is set off, but I don't know the exact aspects of segregation in the term that the institution use it in.

Q. I am referring to the special housing unit at Clinton. Were you ever put in that special housing unit? A. No.

Q. Have you lost any good behavior time as a result of your transfer? A. No.

Q. Have you asked the superintendent at Clinton for permission to play your musical instruments? A. There is no place—I asked for the band, but the fact is there is no band. Just as I was leaving, there might be a band for Christmas, and this is not certain. I have put in for this here.

(154) Q. Have you requested permission to keep an instrument in your cell? A. I have my clarinet in my cell, but at the time I arrive at night it is too late to play it.

Q. Are you able to play it on the weekend? A. No. I be up there on the weekend.

Q. If you return early from the superintendent's house, are you able to play? A. If I should arrive before 7:30, I have a few minutes to play it.

Q. When you were at Wallkill, did anyone other than Martin Sostre come to speak to you about the union activity? A. No, they didn't.

Q. Would it be correct to say that Martin Sostre was one of the leaders of the union activities? A. I could only say he is the one presented it to me.

Q. Do you know whether he presented it to the inmates? A. No, I don't.

Q. Do you know whether he presented it to Mr. Lucas? A. No, I don't know that.

Q. Did you discuss the union petition with any other inmates? (155) A. No.

James Newkirk, Jr.—Plaintiff—Cross.

Q. Who was the inmate that you passed the petition to after you signed it? A. I don't recall the exact name of the person that I passed it to.

Q. But on June 2nd, when the union petition was being circulated, you did not discuss this with any other inmates? A. The individual I passed it to, we exchanged a couple of words about it. He asked me what it was about and I told him it was a petition of trying to get a union at Wallkill.

Q. But you did not discuss it with any other inmate? A. No.

Q. Did you hear Mr. Barnes speak on the loudspeaker? A. Yes.

Q. And you did not discuss that with any other inmate? A. No, I haven't discussed it.

Q. And in the days after June 2nd, did you have any discussions with any other inmates about the union activity? A. No.

Q. Do you know which inmates were the members of the inmate Liaison Committee? A. I don't know them all by name. I know a few of (156) them.

Q. Can you name the ones you know? A. I know Barnes, Henry Best, James Brown, and there was other ones, at least two more I knew by face but not their names.

Q. What was the race of these men? A. The ones I just named, the three, was all black.

Q. How did they come to be members of the inmate Liaison Committee? A. Well, they had a vote ballot there and they was voted in.

Q. Voted by the population? A. Yes.

Q. Was Martin Sostre friendly with Warren Barnes? A. That I couldn't answer. I don't know.

Q. Do you know anything about their relationship at all? A. No.

Q. Were you friendly with Martin Sostre? A. We spoke from time to time, such as many others.

James Newkirk, Jr.—Plaintiff—Redirect.

Q. But you have no knowledge of his relationship with Warren Barnes? A. No, I don't, because a large portion of the time I was there he was in court.

(157) Q. Did there ever come a time when you were working as a truck driver at Wallkill when you encouraged inmates involved in a crucial project not to work for low wages? A. I have never encouraged anyone to do anything.

Q. When the union petition was being passed around on June 2nd, did any officer confiscate it? A. I heard by hearsay it was confiscated.

Q. To your direct knowledge— A. I have no direct knowledge as to one being confiscated.

Q. Did any officer reprimand you for circulating this petition? A. No officer said anything to me.

Q. Did any officer bring charges against you for circulating this petition? A. If so, it is not known to me.

Q. You testified before that you had certain problems with correspondence at Clinton Pison.

Have those difficulties been straightened out? A. Yes, they is pretty well straightened out now.

Mr. Hoffman: No further questions.

Redirect Examination by Mr. Pochoda:

Q. You requested the transfer to Auburn, Mr. Newkirk? (158) A. Yes.

Q. And you did so because you felt that was the only way to get to Wallkill? A. Yes.

Q. Did you request the transfer to Clinton? A. No, I didn't.

Q. And you wanted to stay at Wallkill? A. Yes, that is correct.

Q. You talked about the jobs you first had when you arrived at Wallkill. Later on you became a truck driver? A. Yes.

James Newkirk, Jr.—Plaintiff—Redirect.

Q. And this was a job you enjoyed doing? A. Yes.

Q. And had done on the outside? A. Yes. I drove professionally on the outside.

Q. And prior to that you worked in the automotive vocational shop? A. Yes.

Q. When you left Wallkill you were engaged in activities you enjoyed doing?

Mr. Hoffman: I object to that as a leading question, your Honor.

The Court: It is redirect and I think I will allow it here.

(159) A. Yes, I did.

Q. And you had to wait for a period at Wallkill until you were able to engage in those particular activities? A. Yes.

Q. As you were in the middle of those activities, then you were transferred? A. Yes.

Q. At Clinton Prison, you stated, in answer to a question by Mr. Hoffman, that you see some people from the outside at the warden's house. A. Yes.

Q. When you see those people, you serve them? A. Yes.

Q. You wait on them at tables? A. Yes.

Q. And you might take their coats or turn down their beds? A. Yes.

Q. And that is the relationship you have at Clinton Prison with people from the outside? A. Yes.

Q. And when you were at Wallkill, did you wait on anybody or serve anybody from the outside? A. No.

(160) Q. Did you see people from the outside whom you didn't have to wait on or serve at Wallkill? A. Yes, I did.

Q. This job that you have at Clinton Prison is approximately 13 or 14 hours a day? A. Yes.

Q. Are you busy for most of those hours? A. Yes.

James Newkirk, Jr.—Plaintiff—Recross.

Q. How do you feel when you get back to your room at night? A. Very exhausted.

Q. What do you generally do? A. Go to bed.

Q. And you get up at 6 a.m. and begin the process over again? A. Yes.

Q. At Clinton have you been able to or is there any way to play music with other people? A. No.

Q. Is this important to a musician? A. Yes, it is very important. This is one of the most important aspects of music, being able to play together with other people, being able to communicate musicwise with other musicians.

(161) Q. Do you hope to continue playing music when you leave prison? A. Yes. I hope to get into it professionally.

Q. Do you feel competent to do so? A. Yes.

Q. Do you also write and arrange music? A. Yes, I do.

Q. Turning back to Wallkill again, prior to your transfer had you spoken to any lawyers about the union? A. No, I had not spoken to any lawyers.

Q. You did not receive a visit from any lawyers about the possible union at Wallkill? A. No.

Q. Did you correspond with any lawyers about a possible union at Wallkill? A. No.

Q. The forms that we talked about that you signed on June 2nd, did you have any idea of what these forms were and where they were headed? A. I knew they was union forms.

Q. Do you know what was going to be done with them? A. Yes, I knew they was going to be sent out.

Mr. Pochoda: No further questions.

(162) Recross Examination by Mr. Hoffman:

Q. You testified before that you work all day at the superintendent's house. What is the first thing that you

work on in the morning? A. When I first arrive there, between the time of 6 and 6:30—it varies depending on what officer is taking us up there—the first thing I do is go into the little room we have there in the back of the garage and perhaps I might change my coat and might not and just as soon as the officer gets opened up and straightened out there, he open the house up, and then I proceed on to the house and the first thing I do is start doing the dusting work and things of that nature.

If there was any dirty dishes that have been left over during the night after I have left, I have to clean these up and see the kitchen is properly cleaned up before anyone gets up.

The next thing to do is unload the dishwasher, put the dishes away that was clean over the night, and then I proceed on with the other parts of the housecleaning in the areas where no one is sleeping in at that time.

Q. Approximately how many hours does the cleaning take? A. This is a day's process. You can be going in and (163) out all day doing this.

Q. Is it your testimony that you are working each and every minute of the day when you are at the house? A. I didn't say that.

Q. How much time do you have to relax? A. Sometimes I come out and I might have 15 or 20 minutes before I am called back for something. I might come out and have five minutes.

Q. Do you ever have a longer period than that? A. I would say there have been times perhaps that he was not there that I might have had 45 minutes or even maybe a little longer.

Q. Have you asked to be reassigned from the superintendent's house? A. No, but I didn't want to really disturb the situation due to the fact that I had already put

down for these other two trades and I was hoping for those to come through.

Mr. Hoffman: No further questions.

Redirect Examination by Mr. Pochoda:

Q. Were you hoping at Clinton to get into the automotive field? A. Yes.

Q. Do you feel that if you antagonize the superintend-
(164) ent this might make it harder to get into that field? A. I feel there is a very good possibility that it would.

Q. Has your record been clean at Clinton? A. Yes.

Q. Have you had any disciplinary problems whatsoever? A. No.

Q. You are still waiting to do this automotive work? A. Yes.

The Court: Mrs. Walker, I would ask you the same question I had asked previously, as to whether you have any inquiry you want to put to the witness?

Mrs. Walker: I have no questions, your Honor.

The Court: I have one or two, if I may.

Examination by the Court:

Q. During your direct examination, Mr. Newkirk, you were asked some question by counsel as to whether you had been involved in any fights relative to this union matter, and I noted down as part of your answer the following:

"I didn't get in any of the fights."

Were there any fights which you were aware of which followed the passing of a union petititon, even though you may not have been involved in them yourself? (165) A. No, there wasn't no fights.

Q. Am I correct that when you heard about the announcement on the loudspeaker that there was to be a meeting or persons who were interested could come to a meeting at the key room, you did not go to that meeting? A. No, I didn't.

Q. On cross examination you were asked some questions relative to good behavior time.

As far as you know, has any good behavior time been taken away from you as a result of anything that happened in June of 1972? A. Not to my knowledge.

Q. Since you arrived at Clinton, have you, so far as you know, been earning good behavior time? A. As far as I know.

Q. As far as you know, is it customary when a person reports to a new institution that he be assigned for some initial period to the idle company? A. Most institutions I have been in, right after you first go there you go down and find out what you want to do while you are there.

Q. You had not been at Clinton before you arrived there on June 8th? A. No, I haven't.

(166) Q. Were you interviewed immediately or very shortly after you arrived at the prison on June 8th? A. I think about four or five days I was called and asked why was I transferred up there.

Q. What did you say when you were asked that question? If you remember. A. I told them I didn't know, that I was seeking to find out why I was transferred there.

Q. Did anyone at Clinton tell you? A. No. They said they didn't know the reason for my being transferred.

Q. Did there come a time when you did find out the reason you were transferred from Wallkill to Clinton? A. No, there was no one there could inform me as to why I was transferred.

Q. So that even today, sitting here in this courtroom, you are not certain of the reason why you were transferred on

June 8, 1972, from Wallkill to Clinton, Mr. Newkirk? A. No official has ever informed me as to why I was transferred.

The Court: I have no further questions of Mr. Newkirk.

(167) Re-cross Examination by Mr. Hoffman:

Q. When you were transferred from Sing Sing to Attica, did any official inform you of the reason for that transfer? A. Not that I recall. I didn't know I was going—

Q. When you were transferred from Attica to Green Haven, did any official inform you of the reason you were being transferred? A. I requested the transfer from Attica.

Q. To Green Haven? A. Yes.

Mr. Hoffman: No further questions.
Mr. Pochoda: No further questions.
The Court: You may step down, Mr. Newkirk.
(Witness excused.)

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Testimony at Trial of Petitioner Harold N. Butler [Trial Minutes, pp. 450-608].

(450) HAROLD N. BUTLER, a defendant herein, called as a witness, being first duly sworn, testified as follows:

Direct Examination by Mr. Hoffman:

Q. What is your present position, Mr. Butler? A. I am the superintendent of the Wallkill Correctional Facility.

Q. Would you tell the court briefly what your experience has been on the institutional level in the Department of Corrections?

> The Court: May I inject one question? Were you the superintendent at the Wallkill Facility in May and June of 1972?
>
> The Witness: I was.

A. I was appointed as a prison guard to the New York State Department of Correction in the fall of (451) 1936. I attended the First Central Guard School at Wallkill Prison and was assigned to the institution for male defective delinquents in Napanoch in the spring of 1937. I continued to work there until 1943 when I joined the military service, and remained in the military service until 1946, when I returned to Napanoch.

In 1952 I was appointed as a sergeant at Wallkill Prison, and I remained there until 1956, when I went back to Napanoch as a lieutenant.

I then went to the New York State Vocational Institution as a lieutenant, back to Wallkill, and then I was appointed as an assistant deputy superintendent at the New York State Vocational Institution in, I believe, 1963, and I was appointed as deputy superintendent, at that time deputy warden, of the Green Haven Correctional Facility in 1965.

That same year I was appointed as deputy commissioner

in the Albany office, and I served there until 1971, in charge of personnel, and I also acted as a trouble-shooter for the department in the event there were any difficulties in any one of the facilities, and this occurred on perhaps eight or ten occasions when I was required to visit various facilities where riots were considered or there were sitdown strikes, or whatever (452) problem, I think similar to the Auburn riot in 1970, and I handled the Auburn riot without any loss of life or any serious injuries to any persons.

I also, after being appointed as superintendent at Wallkill—I was asked by the commissioner to assume the role of deputy commissioner again in the fall of 1971 and to return to Elmira because they felt that this institution was going to erupt into rebellion, and I was there for five months and brought the institution back to a normal climate and then returned to Wallkill.

Q. In your past experience on the institutional level have you acted as a disciplinary officer? A. Yes, I have.

Q. Would you tell the court very briefly in what capacity you acted as a disciplinary officer? A. I was the disciplinary officer in Green Haven when at that time it was known as the PK's Court and I was deputy superintendent there.

When I was assigned to Napanoch we were perhaps one of the first institutions that had an adjustment committee and I served on that committee for several years.

Q. How long have you been at Wallkill Correctional Facility? (453) A. As a superintendent?

Q. Yes. A. Approximately a year and a half.

Q. Would you tell the court something about the physical layout of Wallkill? A. It's a medium security institution by most penology standards. There are no locked doors. All cells are left open 24 hours a day. There is a perimeter wire fence around a portion of the facility, not the entire facility.

The institution is completely open until 11 o'clock at night, when the inmates may move about as they will.

It has an extensive academic and vocational training program. It has many innovative programs that other institutions perhaps don't have. It permits a great deal more freedom than most facilities permit because we have selected persons there. Inmates are not sent there, with the exception of the Elmira Reception Center people. All the rest are selected by a staff which visits the facilities.

Q. Do you have a special housing unit at Wallkill? A. No, we do not.

(454) Q. Do you have wings at Wallkill that can be isolated? A. No, we do not.

Q. Will you tell the court how an inmate gets to Wallkill Correctional Facility? A. The inmate usually sends a letter to the commissioner, to myself, or he visits the counselor in the institution where he is housed and indicates an interest in coming to Wallkill. At the time that our people visit that facility for the purpose of interviewing we interview the inmate, review his record, and the men are selected by this committee, and we in turn submit their names to Albany with a recommendation. Albany then usually, with some exceptions, accepts our recommendations and the men are transferred to Wallkill.

Q. Can an inmate earn the right to come to Walkill in the sense that an inmate earns good time credits? A. No.

Q. Can you refuse to accept an inmate at Wallkill? A. Yes.

Q. Will you tell the court how you deal with disciplinary problems at Wallkill? (455) A. Well, we usually have most of our problems—most of the problems, thankfully, are minor because of the population we have there, but they are usually handled by forfeiting some privilege, perhaps a voluntary cell confinement. The door is never locked and

he agrees to remain in his cell during the open hours of the facility.

This is usually successful and is usually all we have to do.

Q. Is it possible at Wallkill to segregate inmates who have hostilities toward each other? A. No.

Q. How do you deal with this problem at Wallkill? A. If we have a very serious hostility or persons who we feel might injure one another, we recommend transfer to another facility.

Q. How would you deal with this problem at a maximum security prison? A. We probably would place them either in punitive housing, in a special housing block, or possibly in administrative housing, for their own protection.

Q. Would you contrast for the court the problems in controlling the security of Wallkill in comparison to controlling security at a maximum security prison? (456) A. Well, first of all, our inmates are permitted to move about the facility at all times without any supervision, without any escorts, and this occurs throughout—until 11 o'clock at night.

It would be utterly impossible to isolate or segregate or control any section of the facility.

For example, on Saturday evenings we have movies in an all-purpose gymnasium and each inmate is required to bring his own metal chair with him, and we have approximately four to five hundred inmates in a very small gym who watch a movie in a darkened area and this is an area that has to be carefully supervised and we have to be very careful there are no problems existing when they go to this kind of situation.

Q. What is the total number of inmates at Wallkill at the present time? A. We have a maximum capacity of 504, but our population usually averages around 475.

Q. Can you give the court an approximate breakdown on the percentage of racial composition there? A. Most re-

cently I had to define that for the United States Civil Rights Commission, and we had 49 per cent black—47 per cent; excuse me—43 per cent white and 10 per cent Spanish-speaking.

(457) Q. Approximately how many transfers do you have per year out of Wallkill Correctional Facility? A. I believe that in the past 18 months is the way we figured it, we had 59, total, transfers, and out of that 59, 12 of them, or 18, were as unsuitable for Wallkill. There were a great many transferred out for medical reasons or by their own request or to enter into a work-release program, but 18 of them were as being unsuitable for Wallkill.

The Court: What period are you talking about?
The Witness: Eighteen-month period.
The Court: In point of time?
The Witness: 1971 until, I believe, the middle of 1972.

By Mr. Hoffman:

Q. Would you tell the reasons why you would transfer an inmate out of Wallkill because you felt he was unsuitable. A. Well, out of this 18, three or four were for homosexual activities. Because of the open cells and the problems inherent in this, we had to move them out.

Several others were for refusing to become involved in the program, and this is one of the reasons why (458) they were transferred there, and they were not interested in the program and we decided to move them.

We had, I believe, a serious fight with one.

This is the general—I don't remember all of them.

Q. When inmates are transferred as a result of unsuitability, does this necessarily involve the bringing of disciplinary charges? A. Yes, if they are unsuitable, we usually bring disciplinary charges against them.

Q. Are all of your transfers necessarily based on disciplinary offenses? A. No, they are not.

Q. Can you give the court an example of where inmates may be transferred for things which would not be disciplinary things? A. Well, the most recent transfers that we made, to Clinton and to Auburn, is one example; but prior to that we had transferred an individual to Attica to become involved in the work-release program. There is no disciplinary action taken there.

Sometimes an inmate feels as if he cannot adjust to the openness of the facility and he doesn't feel comfortable there and he asks to go back to a maximum (459) security facility, and so we do that.

There may be occasions when there are friends or someone they prefer to associate with in another institution, and they ask to be transferred.

The smallest number of our people are transferred for disciplinary purposes.

Q. Do you necessarily speak to inmates before they are transferred? A. No. It depends entirely what the transfer is for or the reasons for it. If a man is being transferred for medical purposes, naturally you are going to discuss the reasons for his being transferred and the kind of treatment he can expect where he is going; but if a man is being transferred in an emergency situation or for disciplinary purposes, it would be most unwise to tell him or to discuss it with him because there may be severe situations develop, or serious situations develop—

Q. Would you tell the court the types of situations that might develop? A. Most recently, I think in California—

Q. Would you restrict it to New York State. A. Well, they could very easily take the inmates en route—

(460) Mr. Pochoda: I would ask if the witness would answer the question in terms of fact and not speculation, your Honor.

A. I have to be prepared any time I send an inmate out for any emergency. I don't know that anyone may attempt to secure this individual en route, but I have to assume that they might.

The Court: I am not sure that that answer would have very much probative weight with the court and since it is already in the record I am not going to strike it, but I would try to direct both counsel and the witness to concrete factual situations.

I recognize you are also an expert and there are certain areas where I will permit opinions to be rendered. I will just take the next question as it comes and we will take them one at a time.

By Mr. Hoffman:

Q. Will you tell the court something about the mechanics of the transfer procedure at Wallkill Correctional Facility?

The Court: We will address ourselves to the year 1972?

Mr. Hoffman: Yes, your Honor.

A. We request permission either in writing or by telephone to the Albany office on a transfer and unless it is an emergency, we do it by correspondence. The Albany office responds by either accepting our request or denying it. Generally they accept it. They determine what institution he shall be transferred to, but they do not select the date. They say an order is issued for the transfer of a certain individual under suitable supervision when it is convenient to the institution.

Q. How do you physically go about effecting the transfer of an inmate at Wallkill Correctional Facility? A. The

deputy superintendent is advised and he selects one or more officers to pick up the inmate, take him to the hospital area where he is dressed and made ready for movement. His personal belongings are taken with him, they are carefully recorded on a transfer sheet, and he takes them generally with him when he moves to the new facility.

Q. To the best of your knowledge, were these procedures followed in this case? A. Yes.

Q. Will you tell the court why these procedures are necessary in a transfer? A. In the event that we were to tell the man prior to our being ready to move him he might barricade (462) himself in his cell, he might encourage some of his friends to assist him in preventing our transferring him, or he may do any of a number of things to forestall his transfer.

Q. What is the Inmate Liaison Committee at Wallkill? A. This is a group in our institution of six inmates who are elected by the inmate population. They are nominated by them, the election is conducted by them, and they work rather closely with the superintendent, not in establishing policy but in better communications between the administration and the inmate population, and since its operation at Wallkill I think it has been a very, very valuable organization, a valuable tool in maintaining good inmate relations, and it has been in existence for about a year.

Q. Can you recall who the members of the Inmate Liaison Committee were in June of 1972? A. I don't believe I can remember all of them. Henry Best, Gagnon, Culpepper, Barnes—Barnes was the chairman of the committee—and I don't recall off-hand—

Q. Do you recall the race of these four men you mentioned? (463) A. I believe that at least three were black, I believe four were black, but out of the six at least three were black.

Q. In June of 1972, to the best of your knowledge was

there any hostility between members of the Inmate Liaison Committee and other inmates in the general population? A. Did you say prior to—

Q. No, I said around June of 1972. A. No, there was no animosity that I could observe. It seemed to me that the Liaison Committee was properly representing the inmate population and I thought accomplishing a great deal.

Q. Did anything unusual occur on June 2, 1972? A. Yes. I received a telephone call at the residence at approximately 6:30—I am not sure of the time—from Lieutenant Connolly, who was in charge of the facility on the evening shift. He advised me that a petition was being circulated by a number of inmates and he wanted to know what to do, and I asked him if there was any difficulty and he said no, and I said not to interfere with it, to permit the petition to be circulated, but keep the situation under control, keep it under observation.

(464) About an hour later he again called me and he said that a number of members of the Liaison Committee had come to him and were very much disturbed because they had been advised by other inmates that the petition was being circulated as being sponsored by the Liaison Committee.

He also felt that he should be given an opportunity to address the population just to indicate to them that they did not sponsor the circulation of these petitions, and I asked him if he had a prepared statement and he said he had, and I asked him to read it to me over the phone and he did, and I said yes, I would permit this to be broadcast on the PA system.

About an hour later, or half an hour later, I have forgotten which, I had another call that stated that there was considerable unrest developing, that a great deal of tension had developed, there was a lot of loud arguments erupting in various parts of the institution, and that he wanted to

know what he should do. And I asked him were there any fights and he said no, none that he knew of.

I said to keep it under careful supervision and let me know if it develops, and I heard no more from him the rest of the evening.

(465) Q. What transpired on the following day and the days thereafter? A. The following day was Saturday, and then Sunday, the 3rd and 4th, and the institution remained calm for those two days. I kept in touch with the facility and I reported for duty on the 5th and I asked Assistant Deputy Superintendent O'Mara, who was on that day acting deputy superintendent, to investigate the situation and make whatever recommendations he thought were needed.

He later that day submitted a recommendation to me that approximately eight or ten individuals were very vocal in continuing their arguments for an inmate labor union, and the Liaison Committee was equally vocal in assuming that this was taking away a bit of their authority or making their function useless, and we decided to wait a day or so with the hopes that this might subside. However, it did not.

On the 6th I called the Albany office and told them a situation was developing that I felt needed attention, that there were a number of inmates who were creating a situation that could lead to trouble, and I asked that they be transferred to a suitable facility, without any disciplinary action.

Q. Was there any particular incident or event (466) that you feared would take place? A. Well, on Saturdays we planned to have our regular movie, which most of the inmates look forward to, and this would be a very dangerous place to have even one argument or one serious discussion that might end up in a very bad riot. It is the kind of a situation that lends itself to this.

Also, there had been a number of inmates who had come to officers or to the supervisors and had stated they were fearful that trouble was going to erupt—

Mr. Pochoda: Your Honor, I would object to that answer on the grounds of hearsay. That is double hearsay, I believe.

The Court: Let's strike the answer, and perhaps you can go about the matter in a different way and we will see what develops.

So the objection is sustained, the answer of the witness is stricken.

Q. Were there any meetings that took place in the population? A. There was a meeting in front of the key room on the evening of the circulation of the petition immediately following Mr. Barnes' announcement over the (467) PA system, but it was rather an impromptu sort of thing and was held in an open hallway or an open corridor. There were a number of heated arguments that took place during this time, enough to alert or alarm the supervising officer, who was standing in the hall at the time, Lieutenant Connolly.

Mr. Pochoda: I would ask this be stricken as hearsay.

The Court: Let me make one inquiry of the witness before I rule.

My recollection is that you were not present at the facility on the occasion about which you have just testified?

The Witness: That is correct.

The Court: So that you received a report from another?

The Witness: Yes.

The Court: From whom did you receive that report?

The Witness: Lieutenant Connolly.

The Court: As I understand it, Lieutenant Connolly's deposition has been taken and would be the best evidence. I would therefore sustain the objection and direct that the response of the witness be stricken.

(468) Q. Did the Inmate Liaison Committee meet during that week? A. Yes, they did.

Q. Was there any apprehension on your part about this meeting? A. Yes.

Q. Will you tell the court the steps you took in relation to this meeting? A. I asked the supervisor to give it careful supervision, to be present personally, and to make certain that nothing transpired or to stop anything before it started, and Lieutenant Connolly was present.

Q. Whom did you designate to investigate the situation in the institution? A. Assistant Deputy Superintendent Edward O'Mara.

Q. Did you designate anyone else to make an investigation? A. No.

Q. What did Mr. O'Mara report to you? A. He reported that there was considerable tension, that there were approximately eight inmates who were continuing to voice support for an inmate union, and that he was fearful that there may be trouble.

Q. Were the plaintiffs included in this group of (469) eight? A. They were.

Q. Do you normally oppose the circulation of a petition at Wallkill Correctional Facility? A. No.

Q. Will you tell the court why you were concerned about these particular incidents involved in this case? A. Only because of the attitude from a great number of the population, especially the Liaison Committee, in opposition to this petition.

Q. What action did you finally take as far as the inmates were concerned? A. I decided, after consulting with the—

the deputy superintendent had returned to duty, Nelson Otis, Mr. O'Mara, Mr. Connolly, and we decided to request the transfer of five men.

Q. Why did you choose these five people? A. They were extremely active in maintaining, as I mentioned before, the support for the union. They also were extremely friendly with and worked closely with, as near as we could determine, Martin Sostre, who was then a resident of our facility.

Q. Did you institute any disciplinary proceedings (470) against these inmates? A. No.

Q. Did any of these inmates lose any good time credit as a result of your action? A. No.

Q. Did you cause any of these inmates to be placed in solitary or segregated confinement? A. No.

Q. Did you issue any instructions as to how they were to be treated at the receiving institution? A. No.

Q. Were any of the inmates that were transferred subsequently paroled? A. Yes.

Q. Do you recall who those inmates were? A. Two that we transferred were paroled, Rodriguez and I believe Oliver. Others who signed the petition or who circulated it have been paroled too. I believe one was on the stand yesterday, Coy Smith.

Q. Did any fights break out between any of the five inmates that were transferred and another inmate? A. One. On the day of the transfer—I believe that was the 9th—there was a scuffle outside the deputy superintendent's office, and when they rushed out (471) inmate Oliver and an inmate by the name of Price had been either involved in a fight—Oliver had a pail in his hand and was threatening Price with the pail.

Mr. Pochoda: I ask this be stricken on the grounds of hearsay.

The Court: Were you present? Did you witness that?

The Witness: No. This was a report from the deputy superintendent.

The Court: I would strike the testimony relating to what occurred on the 9th where inmate Oliver was alleged to have threatened another inmate. That will be stricken from the record.

You indicated that five men were selected for transfer and they would include the two plaintiffs, Mr. Newkirk and Mr. Lucas?

The Witness: Yes, sir.

The Court: You indicated in addition the two prior plaintiffs who have been dismissed from this action, Mr. Oliver and Mr. Rodriguez. Could you tell us the name of the fifth individual?

The Witness: Inmate Rosario, who went to Clinton with Lucas and Newkirk.

Q. What was the general atmosphere in the insti- (472) tution after these transfers were effected? A. All tension seemed to resolve. It was back to normal almost immediately. We had no more problems.

Q. Did you at any time confiscate any of the union petitions? A. No.

Q. Did you at any time attempt to obstruct the union petitions from leaving the institution? A. I did not.

Q. What is the manner in which you receive information about problems between inmates at the institution? A. Sometimes from prior observation, but quite often from an inmate who reports to an officer or to a supervisor of a situation.

Q. Did you receive information in this manner in this particular situation? A. I did not personally, but my subordinates did.

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Q. Did they report to you? A. Yes, they did.

Q. What are the problems involved in having inmates testify against each other at disciplinary hearings? (473) A. I think it would be fraught with danger. First of all, it would identify an inmate as providing information, we would have continual fights, in my estimation. It would not be a good way to handle it.

Q. What would be the problems involved in granting inmates a hearing prior to their being transferred from an institution in a case like the case we have now? A. Well, for one thing, we do not have any isolation area where we could place them in an emergency. If two men were in a fight and it would not be safe to release them or let them out into the population, we do not have an area where we could keep them confined until it was determined whether or not they should be transferred.

Q. Would the formation of an inmate labor union in Wallkill in June, 1972 pose any specific problem vis-a-vis the Inmate Liaison Committee? A. I believe it would usurp their function, their authority, their responsibilities, and I thought they have done a very fine job. I thought it was a fine introduction, or something that was long needed.

Mr. Hoffman: I have no further questions at this time.

(474) Cross Examination by Mr. Pochoda:

Q. Mr. Butler, you have admitted in this case that you are opposed to the formation of an inmate labor union at the Wallkill Correctional Facility, is that right? A. Yes.

Q. And that was your attitude prior to June 2, 1972? A. I don't think I ever considered it prior to June 2, 1972.

Q. You were familiar with the formation of an inmate labor union at the Green Haven Correctional Facility? A. Yes.

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Q. Would it be fair to say that as a general matter you opposed the legal recognition of that type of inmate organization in a prisson? A. Yes.

Q. And you have stated to me in the past, have you not, that if you had to sit and bargain with representatives of such a legally recognized inmate labor union it would be very difficult for you to run the prison? A. Yes, I believe that is similar to what I may (475) have said.

Q. You feel, do you not, that just the functioning—just the presence of a functioning and legally recognized inmate labor union would create serious problems for the running of the Wallkill Correctional Facility? A. It could. I say it could create serious problems.

Q. And you felt that way prior to June 2, 1972? A. Yes.

Q. I take it that you are not very happy with the amount of publicity given to the formation and development of the Green Haven labor union? A. That doesn't bother me.

Mr. Hoffman: Your Honor—

The Court: I think the witness has answered the question and we will leave it in the record.

Q. Did you discuss with any inmates at Wallkill prior to June 2, 1972 your feelings or opinions about inmate labor unions? A. No,, sir.

Q. You did not state that you were not in favor of such type organizations. A. No, sir.

(476) Q. You did not state to any inmate that such organizations were prohibited at the Wallkill Correctional Facility? A. No, sir.

Q. And you did not state that the circulation of union authorization forms were prohibited? A. No, sir.

Q. In fact, there was no rules prohibiting those activities? A. None whatsoever.

Q. You were aware, I assume, in light of the situation at Green Haven, that such an inmate union effort might begin

at the Wallkill Correctional Facility? A. Well, I knew it had happened at Green Haven but I didn't know it would occur at Wallkill.

Q. You did not consider the possibility that it would begin at Wallkill? A. No, I did not. That never entered my mind.

Q. Turning to the events that began on June 2, 1972 at the Wallkill Correctional Facility, you stated you received the first phone call from Lieutenant Connolly about 6:30 p.m.? A. As near as I can recollect.

(477) Q. At that point Mr. Connolly informed you that certain forms were being passed around? A. Yes.

Q. He informed you at that time that these were forms for an inmate labor union? A. He thought they were.

Q. I take it when you heard that you were not very happy that that was what the subject of the forms was? A. I don't agree with that. I told him to permit the circulation of the forms, "Don't do anything to stop them."

Q. You told him at that time, did you not, to convey the information about the circulation of these forms to the Inmate Liaison Committee? A. No, I did not. I asked him what was the attitude or how did the Liaison Committee feel about it.

Q. What did he answer? A. He told me that they were not very happy about it.

Q. Did you give him any instructions relative to the Liaison Committee at that time? A. As far as I recall, no.

(478) Q. And you did not instruct him to stop the circulation in any way? A. No, I did not.

Q. Did you instruct him to find out who was most involved in the circulation? A. No, I did not.

Q. Approximately an hour later, you testified, Connolly called back? A. Yes.

Q. You were located at your home at this time? A. Yes, sir.

Q. Where is that in relation to the prison? A. About a mile from the institution.

Q. And the major portion of that conversation was with Mr. Warren Barnes, is that right? A. Part of it. Mr. Connolly started the conversation by telling me that Barnes and several other members of the Liaison Committee had come to him, were very much distressed because they felt that the petition was being circulated as being sponsored by the Liaison Committee and he wanted to make an announcement that this was not the case.

Q. Mr. Barnes wanted to make the announcement? A. Yes.

(479) Q. Mr. Connolly informed you of this? A. Yes.

Q. Was there anything else he informed you at this time? A. That is as best I can recall, the gist of the conversation.

Q. Then Mr. Barnes got on the phone? A. He said to me could Barnes speak to me and I said yes, to put him on. He told me the same thing, and he said, "I would like to read a prepared statement over the PA system," and I asked him to read it to me and he did, and I told him this was approved.

Q. Did Mr. Barnes go into detail as to what was occurring at the Wallkill Correctional Facility at that time? A. No.

Q. This was extremely unusual, for an inmate to speak over the PA system? A. It is very unusual to have a chairman of a Liaison Committee. We never had one before. This was the first time—

Q. If you will just answer the question, please.

This is very unusual? A. I would say it is the first time, in my recollec- (480) tion as superintendent.

Q. You felt, however, that it was important to take immediate action in this case? A. I felt it was necessary for him to make this announcement to the inmates.

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Q. After you spoke to Mr. Barnes did you then speak to Mr. Connolly again? A. Yes. Mr. Connolly called me back—

Q. During this same conversation, after you spoke to Mr. Barnes, did you ever speak to Mr. Connolly again before you hung up? A. I may have said a couple of words but I don't recall any conversation at that time.

Q. After Mr. Barnes said he wanted to make the announcement you said okay— A. I may have said to Mr. Connolly that it was all right for him to make the announcement.

Q. You didn't ask him to wait and consider it further? A. No.

Q. You didn't consider going over to the institution to find out what was occurring? A. No.

Q. You made no other orders about changing the routine at the institution in any manner? (481) A. No, I didn't.

Q. You yourself felt it was important that inmates work through the Liaison Committee? A. Yes.

Q. And then you felt it was important that this kind of action that bypassed the Liaison Committee be discouraged? A. No, I didn't attempt to discourage it; I merely attempted to permit the institution population to know the Liaison Committee did not sponsor it. I felt they should know this.

Q. You knew, did you not, that the announcement by the Liaison Committee would discourage inmates from signing the forms? A. No, I don't think so. I think most of the inmates had signed already, those that were going to sign.

Q. But inmates in the future, after hearing the announcement, they would be discouraged? A. I doubt it. I don't think the fact that the Liaison Committee sponsored or not would have anything to do with it.

Q. You yourself had no information as to what was being said when the petition was being passed around? (482) A. No.

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Q. You had no information as to where this possible misconception came from as to who sponsored this petition? A. No. The information I received was from both Lieutenant Connolly and Mr. Barnes. Both of them advised me they had been told. I was not personally there so I could not have gotten that information from the inmates.

Q. The PA system can be heard throughout the institution? A. That's right.

Q. And it is generally used for announcements by either administrators or correction officials as to routines, about how to run certain—necessary announcements for the running of the institution? A. They use it to call inmates for visits, to call inmates for assignments. It is generally used 90 per cent of the time for inmate announcements by a member of the staff.

Q. It is fairly frequent that the inmate would hear some announcement over the PA system? A. Yes.

Q. And on every other occasion those announcements (483) were made by a member of the correction staff? A. Usually, yes.

Q. When an inmate heard the PA system go on he would assume it was an announcement by someone on the official staff? A. I think Mr. Barnes announced he was inmate Barnes, chairman of the Liaison Committee.

Q. You did not hear what he said? A. No, but he read the announcement.

Q. You did not hear what he said? A. No.

Q. When an inmate hears the PA system he assumes it is a member of the correctional facility—

Mr. Hoffman: I think that is calling for the operation of an inmate's mind, your Honor.

The Court: I think if you want to inquire in this area you could rephrase your question so it would not be objectionable as to form. I will sustain the

objection and if you want to pursue the matter, just rephrase the question.

Mr. Pochoda: I will withdraw the question, your Honor.

Q. Again during this conversation you did not tell Mr. Connolly to stop the circulation of the petition or (484) interfere in any way? A. No, sir.

Q. It was approximately one-half hour later you stated you received another call from Mr. Connolly? A. Approximately.

Q. And at this point Mr. Connolly indicated that there were some verbal arguments? A. Yes. He wanted to know if I would give him permission to post the announcement made by Barnes on the bulletin boards. All announcements have to be approved by the superintendent. And I said I would.

Q. So he called at this time to ask if he could further disseminate the information from the Liaison Committee? A. That's correct.

Q. Did he indicate at that time that there was some reaction to the initial announcement over the PA system by the Liaison Committee? A. He said there were a number of heated discussions relating to—between members of the Liaison Committee and the members or persons who were most vocal in supporting the union. It didn't refer to the announcement, it was just a continuation of this difference of opinion between two groups of people.

(485) Q. Had the announcement been made prior to his third telephone call to you? A. Yes.

Q. And it was only in the third telephone call that he mentioned some serious verbal arguments or loud discussions? A. No, he mentioned it in the second. He said there seemed to be a great deal of discussion and argument as to who was sponsoring this petition. This is

one of the reasons why I wanted Barnes to indicate that it was not the Liaison Committee that was sponsoring it.

Q. You felt that this announcement would reduce the tension and the anxiety in the institution? A. Right.

Q. Did you have any discussions with anybody else who was present on the night of June 2nd, who was present at the institution, on June 2nd? A. I think I spoke to Sergeant Alexander.

Q. During the night of June 2nd? A. No, not that night; later.

Q. I am talking about the night of June 2nd. A. No one else.

Q. You had no further contact with anyone there? (486) A. None whatsoever.

Q. The only other person present on June 2nd who you subsequently spoke to was Sergeant Alexander? A. No, I spoke to perhaps some of the other officers who were on duty.

Q. I show you Plaintiffs' Exhibit 2 in evidence and ask if you have seen that report before. A. Yes, I have seen this.

Q. And this is a report from Mr. Connolly to Mr. O'Mara? A. Yes.

Q. The subject is the circulation of petition for inmate union. When did you receive this report? A. On Monday morning.

Q. Monday morning? A. Yes, as near as I can recall.

Q. How did you receive this report? A. Probably from Mr. O'Mara.

Q. You are not sure? A. I am not sure.

Q. I also show you Plaintiffs' Exhibit 3 and ask if you have seen that before. A. Yes, I have seen this—I think I have seen this, but I am not positive. I believe I have. That (487) is just a short statement—

Q. This is addressed to Ed. That would be Mr. O'Mara? A. Yes.

Q. And signed "Art." Would that be Mr. Connolly? A. Right.

Q. Do you know when you might have received this report? A. Probably the same date, probably on Monday.

Q. Did you receive any other written reports as to what occurred on June 2, 1972 at the Wallkill Correctional Facility? A. Not from the officers. From the supervisors only.

Q. Who would that be? A. Deputy Superintendent Otis, Sergeant Alexander. These were perhaps the only—and, of course, Assistant Deputy Superintendent O'Mara.

Q. You received a separate written report from Mr. Alexander? A. One that he had submitted, I believe, to Mr. O'Mara and it was included in the report that was submitted.

(488) Q. I show you Exhibits 12 and 13 and ask if those are the reports you are referring to from Mr. O'Mara. A. This is the written report that Mr. O'Mara gave to me on Monday.

The Court: Indicating which of the two exhibits, the number?

The Witness: No. 12.

The Court: That is a report from whom?

The Witness: Assistant Deputy Superintendent O'Mara, prepared on Monday and given to me on Monday.

This Exhibit 13 is also a report submitted to me by Mr. O'Mara on Tuesday.

Q. Are these two exhibits the reports that you were referring to when you stated you received reports from Mr. O'Mara? A. Yes.

Q. I would also like to show you Exhibits 7 through 11, reports from Mr. Otis, and ask you if you have seen those before. A. 7 I have seen. 8—

Q. You have seen 8? A. Yes. 9, 10 and 11.

Q. Do you recall when you first read these reports? (489) A. I believe it was Thursday morning.

Q. That would be the 8th of June? A. Yes.

Q. Did you receive any other written reports— A. These reports were prepared for transmission to the Albany office. I included them in transmission when I requested the transfer—I included the reports to the Albany office.

Q. You did not have these reports prior to your decision to transfer people? A. No.

Q. They did not enter into that decision? A. Yes, they did. We discussed it verbally in my office with Mr. O'Mara and Mr. Otis.

Q. And subsequent to that he wrote this up for the records? A. Yes. We had requested it verbally of the Albany office, had requested it by phone, and then we prepared the written reports for transmission to Albany.

Q. So that Mr. Otis was involved in the decision to transfer? A. Upon his return, yes.

Q. Did you receive any other written reports that related to the events of June 2, 1972 at the Wallkill (490) Correctional Facility? A. There may have been mention of some other report in a report, but not individual reports, no.

Q. These would be the extent of it? A. Yes.

Q. I take it this report from Mr. Connolly, Exhibit 2, that you stated you have seen, did influence your decision to transfer plaintiffs? A. Well, it weighed heavily in the decision, yes. He was the officer in charge on the evening of the 2nd. He has been the officer in charge of that shift for a long period of time and was well acquainted with the inmate population, and you become rather well acquainted with the inmates.

Q. Did you request Mr. Connolly to prepare this report? A. I requested a report.

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Q. When was that? A. On the night of the 2nd, when he was talking to me.

Q. During one of your phone calls? A. Yes.

Q. I take it it is usual practice that when you are interested in obtaining certain information as to (491) what happened in a certain period of the institution and you were physically not present, you would speak to the officer in charge? A. Right.

Q. I would like to go through this report briefly now. The first sentence reads:

"At 6 p.m. this evening C.O. Blake informed me he observed a petition being circulated by inmates 9273, Sostre, and 9890, Rosario."

When you read this report and saw the words "being circulated," what did that mean to you? A. It was being passed around through the population or someone was taking it about and obtaining signatures.

Q. You envisioned that Mr. Sostre and Mr. Rosario— A. No, I don't believe Mr. Sostre ever would do that. He never circulates anything. He gets somebody else to do it for him. I knew he wouldn't be circulating it.

Q. You did not believe Mr. Sostre was circulating it? A. That's right.

Q. Did you believe that Rosario might be? A. Yes.

(492) Q. You thought that perhaps C.O. Blake was mistaken when he said Sostre was circulating the petition. A. I thought he may have indicated Sostre was the brains behind it, because Sostre was the man who had encouraged other people to circulate.

Q. You read the sentence to mean that Sostre was the brains behind the petition? A. Or the man directing other inmates to do the circulating for him.

Q. That was your impression when you read this particular sentence? A. Yes.

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Q. Mr. Rosario, you believed, was circulating the petition when you read this sentence? A. Yes.

Q. What physically did you envision Rosario doing? A. Either having inmates come to his room to sign them or taking the petition itself out to other inmates for them to place their signature on it, affix their signature to it.

Q. It goes on to read:

"At 7:15 p.m."—and an inmate's name is crossed out —"C2019 came to me and told me a serious (493) situation was developing in the institution. He was asked to sign a petition for an organization of an inmate union. He said he refused because the petition had not been cleared through the Inmate Liaison Committee. He said eight or nine inmates were canvassing the population for signitures."

When you read this sentence, "eight or nine inmates were canvassing the population," what did you understand that to mean? A. You must remember, we have had a lot of petitions circulated in the institution. This was not something new and we have permitted these petitions without any interference whatsoever, relating to all kinds of things. So this was not something new. Even though I might not have agreed to the purpose, I was not opposed to a petition.

Q. What do the words "canvassing the population" mean to you? What did they mean when you read this report? A. They were asking inmates if they cared to sign a petition relating to the formation of an inmate union.

Q. The next sentence:

"Mr. Butler was contacted and he advised me to convey all the information regarding the petition to the (494) Liaison Committee."

You testified that you did not make that kind of statement. A. I don't remember that phrase, that manner of speaking. At that time he may have indicated to me that

the Liaison Committee was disturbed and I perhaps said, "Well, talk it over with Barnes"—he was the chairman—to find out whether he approved or didn't approve this and he most vehemently indicated he did not and wanted this annoucement made to the population.

He felt that some of the canvassers were implying that this was approved by the Liaison Committee and he did not want that to be an opinion amongst the population.

Q. And you felt that that was serious, that some inmates might be under this misconception and you wanted this unusual announcement to be made? A. The Liaison Committee was an entirely new organization in the institution that had served admirably, and they had done a fine job for the inmate population and for the administration, and it seemed to me they were entitled to make the announcement.

Q. You felt they might be discredited— A. I just felt that their existence depended a (495) great deal on making this kind of announcement.

Q. It is true that some weeks, perhaps a month prior to this, the Inmate Liaison Committee had put up an announcement that appeared publicly throughout the institution that they were opposed to all petitions whatsoever? A. I don't remember any such announcement.

Q. Mr. Barnes in his testimony indicated that had been done. A. I am not aware of that.

Q. It is possible that happened? A. I hardly think it is possible because I usually see the petitions that go on the bulletin boards.

Q. I skip some. The bottom of the last page:

"The following inmates were canvassers for the petition," and the names listed are Sostre, Rosario, Newkirk, Kenny and Oliver."

Do you know or did you know when you read this if Mr. Connolly had seen these men circulate the petition

with his own eyes? A. I think he may have seen some of them but I doubt whether he saw all of them.

Q. Do you know which ones he saw? (496) A. No, I don't.

Q. Did you know when you received this how he received the information as to who was canvassing the petition? A. I don't know how he received the information. I wouldn't be able to speak for Mr. Connolly.

Q. After you received the petition did you ask Mr. Connolly specifically how he received the information as to who canvassed for the petition? A. I didn't even show any interest in who was circulating the petitions on the night of the 2nd. I never bothered to ask him.

Q. I am referring to after you received the report on Monday from Mr. Connolly, did you ask him specifically where he got the information as to these five names? A. I was not interested in the canvassers. I was only interested in those creating trouble in the facility, who were keeping the argument alive between the Liaison Committee and the members who wanted a union. I was not interested in discouraging the formation of the union. I was not—

Q. I am not implying that. I am asking if you know specifically where or from whom Mr. Connolly received information, for example, that Mr. Rosario was a canvasser (497) on the night of June 2nd; do you know? A. I presume from the officers.

Q. You do not know? A. I don't know where he obtained his information.

Q. When you received this report you did not ask him which officer he might have received this information from? A. No.

Q. Did you speak to Mr. Connolly further after receiving this report on Monday just what he meant by some of the language in the report? A. I discussed it with him.

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Q. When was that? A. Probably Monday evening. I am not exactly sure.

Q. What did you ask hir at that time? A. I wanted him to tell me whatever he could about what happened, what transpired, how actively these people were involved, what was the instant situation, what was his assessment of the climate in the institution. I asked all those questions.

Q. Did you ask him about what occurred on Friday, June 2nd, or the present climate? A. I was not interested in what happened on (498) Friday.

Q. So that this document, this report, Exhibit 2, was pretty much the last information that you received or wanted to receive from Mr. Connolly about Friday, June 2nd? A. Would you repeat that?

Q. After you received this particular document, Exhibit 2, you no longer questioned Mr. Connolly about what happened on June 2nd? A. Oh, yes, we discussed it. It was part of the total conversation, but if it referred to the circulators of the petition I was not interested in who circulated petitions.

Q. What other information did Mr. Connolly give you about what occurred on June 2nd that you were interested in? A. He advised me that there was an altercation or some serious discussions or some serious argument in the key room area that evening that alarmed him and a number of the other officers who were present. They were fearful that there may have been a fight that would break out, but it didn't.

Q. At that time Mr. Connolly did not attempt to reinforce the personnel at the key room, did he? (499) A. No.

Q. Did he indicate to you which inmates were involved in this argument at the key room? A. I think in subsequent reports they may have indicated that one or two of the persons transferred were present at that time.

Q. Sticking to Mr. Connolly, did he indicate who was

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involved in the dliscussion at the key room? A. It involved several of the inmates. He didn't know them all but he indicated severall of the names of the men present.

Q. Can you telll us the names? A. Offhand, I don't know. I think Mr. Lucaas was one, but I am not certain.

Q. But did Mir. Connolly state Mr. Lucas was at the key room? A. I think he did—or in the area, in front of the key room.

Q. What did Mr. Connolly say Mr. Lucas was doing? A. I think he wras one of those that may have been involved in a heateed discussion.

Q. Did he say he was involved in a heated discussion? A. He may have..

(500) Q. You don't recall? A. No, I am not certain.

Q. Did he say what the discussion was about that Mr. Lucas was involvved in? A. No, he didn't.

Q. Did he say who he was discussing it with? A. No, he did not.

Q. What otherr information did Mr. Connolly relate to you about June 2nd that you felt was important? A. The very fact that there was—the only information that he related to mee that I considered was very important was the oppositiion or the—well, the oppositi[illegible] of the Liaison Committeee to the circulation of the petition. That is perhaps the exxtent of his discussion with me.

Q. Was there any other information about June 2nd that you obtaineed from Mr. Connolly or does that pretty much cover it? A. That pretty much covers it.

Q. Did you haave any subsequent discussions with Mr. Connolly about tthe events that took place on June 2nd? A. I doubt it. IIt may have come up in a conversation, but I couldn't reecall it.

The Court: I think this might be a good time (501) to take a very short break. It is a quarter

of 12 and we will recess for five minutes, if that is convenient to all concerned, and then we will resume and continue to 1 o'clock.

(Recess.)

By Mr. Pochoda:

Q. Mr. Butler, you mentioned that you had further conversations with Mr. Connolly on Monday, June 5th I believe that would be, about the present situation at that time in the institution. A. Yes.

Q. What did Mr. Connolly tell you about that situation? A. He felt that there were still rival factions and that there was a great deal of tension and he was concerned.

Q. When you say rival factions, you mean the Liaison Committee members on one side and certain persons involved with the union on the other side? A. Yes.

Q. Did Mr. Connolly state to you who those persons were? A. Yes. He mentioned some of them.

Q. Who did you state— (502) A. He mentioned, again, Martin Sostre. He mentioned most of the persons that were submitted on the list to me by the assistant deputy superintendent: Lucas, Newkirk, Rosario—

Q. Are you referring to Exhibit 12? Is this the list you are referring to (handing)? A. Yes. I don't think he had Rodriguez' name on his, but he did have similar names to what I have on here.

Q. Did he have other names besides those? A. I am not exactly certain. There may have been. I am not certain.

Q. Is it your recollection that he had all of those names except Mr. Rodriguez? A. I don't remember him reporting Rodriguez. This was a new man that was reported the following day or had been reported by Mr. O'Mara on information given to him by other people.

I think there was a great deal of similarity in the persons that he considered actively involved in this.

Q. Had you prior to that discussion on Monday asked him to compile such a list? A. No, I had not.

(503) Q. You just began the discussion on Monday and asked him who was the most actively involved with the union? A. I think he did it for his own information, prepared a list of the persons he thought might have been in it—

Q. He had a written list of names? A. Yes. He may have prepared it for Mr. O'Mara. I am not certain.

Q. Do you know if he gave that list to Mr. O'Mara? A. No.

Q. He prepared it for you? A. I am not certain. I think I may have seen a list he submitted.

Q. This list of persons were the persons who after June 2nd were actively involved in the union? A. No, not actively involved in the union, but persons who were very vocal and who continued to create a problem with the Liaison Committee. I thought perhaps the situation might resolve itself with the passing of a day or two, that they would stop this. After all, the petitions had been prepared. But it didn't; it continued.

Q. You thought that active discussion about the (504) union might cease after the Liaison Committee announcement? A. That's correct.

Q. You believed that Mr. Newkirk was on Mr. Connolly's list? A. I believe so.

Q. What did he say Mr. Newkirk did on Saturday, June 3rd? A. I don't specifically remember.

Q. Do you know what he said Mr. Newkirk did on Sunday, June 4th? A. I don't think he gave me any report whatsoever on what transpired on the 3rd or 4th. This was on a Saturday and Sunday and, as near as I can recall, it was comparatively quiet those two days.

Q. Basically you are referring to what took place on Monday, June 5th? A. Yes.

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Q. What did Mr. Connolly say Mr. Newkirk did on Monday, June 5th, that included his name— A. He did not specifically indicate what he did on the 5th. He said from the information gathered, or Mr. O'Mara stated from the information he had gathered, and part of that came from Lieutenant Connolly, that these (505) persons he submitted to me were very active in their support, vocally, concerning the inmate union, establishment of an inmate union.

Q. Mr. Connolly might have gotten his list from Mr. O'Mara? A. No, Mr. O'Mara got his from Mr. Connnolly.

Q. Mr. Connolly, I take it, was not at the institution until 4 p. m. on Monday, June 5th? A. That's correct.

Q. When was your discussion with him on Monday? A. Probably just before he went on duty. He usually comes on very early and I am there long after he comes on.

Q. So his information would not include personal observations he had made at the institution on Monday, June 5th? A. It may have included his thinking. I am not sure of that.

Q. He was not on duty at that time? A. Not during the day. He was on duty on the 4-to-12 shift.

Q. This discussion with you was prior to the 4-to-12 shift on Monday? A. Yes.

(506) Q. You don't know what made—specifically what actions that Mr. Lucas had done that made Mr. Connolly include his name on the list? A. That's correct.

Q. Did Mr. Connolly mention any of the persons on the Inmate Liaison Committee as having been very vocal in opposition to the union? A. No.

Q. This was not mentioned? A. No.

Q. He just said there were these two rival factions? A. Yes.

Q. Did you ask him who on the Liaison Committee were most vocal and continued to speak out against the union? A. No, not specifically, I didn't.

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Q. Did you have any subsequent conversations with Mr. Connolly about the union situation or who should be transferred because of this situation? A. No.

Q. After this discussion on Monday that ended Mr. Connolly's involvement in this passing of information along? A. Right.

(507) Q. I ask you to look at Plaintiffs' Exhibit 3 (handing) just to refresh your recollection.

This states—I believe to the best of your recollection you think you received this on Monday— A. No, I didn't say that. This is a report from Mr. Connolly to the assistant deputy superintendent concerning the observations of one of the employees.

Q. You don't know if you yourself received this? A. I don't remember whether I got this orally or whether I saw this in writing.

Q. It says that Mr. Koch reported certain information about Mr. Lucas and Mr. Passanante. You do not know whether Mr. Koch observed Mr. Lucas or Mr. Passanante doing anything or got the information from someone else? A. If he states he observed it—

Q. "C.O. Koch reported Lucas and Passanante were circulating the petitions for a union."

You do not know how Mr. Koch got that information? A. I presume he observed it, because he is an officer on duty and would have an opportunity to observe it.

Q. You do not know whether he observed it? A. No.

(508) Q. On Friday night, June 2nd, Mr. Koch was not on duty? A. I am not aware of that.

Q. Did you have any conversations with Mr. Koch? A. None whatsoever.

Q. About this situation? A. None.

Q. You testified that at some point you asked Mr. O'Mara then to investigate the situation further? A. That's correct.

Q. When was that? A. Monday morning.

Q. What did you tell Mr. O'Mara? A. I reviewed the situation of what happened on the 2nd and that I believed that tension was continuing and might be building, and I wanted him to make a thorough investigation and report to me.

Q. Mr. O'Mara was not on duty on the night of June 2nd? A. No.

Q. You say the information about June 2nd was information you obtained from Mr. Connolly. A. Most of it, yes.

Q. Who else did you obtain information from? A. I think probably I received all of it from Mr. (509) Connolly. That is who I had the conversation with over the phone.

Q. Did you direct Mr. O'Mara to take certain steps in conducting his investigation? A. No.

Q. I take it that this Exhibit 12 is the result of the investigations that Mr. O'Mara took pursuant to that conversation? A. Yes. This is his report.

Q. When did you receive this report? A. I believe on Monday afternoon.

Q. That same day, Monday afternoon? A. Yes.

Q. Just looking at some of the items in this report:

"A copy of the petition was confiscated from No. 9927, Passanante, which contained three names."

You were aware that the petition had been confiscated? A. No. I wasn't aware that any petition was confiscated that contained names. I think a petition was obtained to determine who was being circulated without the destruction of any that had any names attached to it.

(510) Q. Does hearing this refresh your memory about that? A. I don't remember, no, not of any petition that was picked up that had any names on it or that was kept or confiscated, as you mentioned.

Q. Do you have any reason to doubt that the information

contained in that sentence is incorrect? A. I doubt any petition was confiscated that bore any names.

Q. You believe Mr. O'Mara is mistaken when he states a petition which contained three, and after the word three the numeral 3, names, was confiscated? A. Yes.

Q. You believe that was a mistake? A. I did not know of any petition being confiscated.

Q. It is possible that petitions could be confiscated and you would not have knowledge of that? A. It could be, but I doubt it.

Q. You think this was a mistake on Mr. O'Mara's part? A. Yes.

Q. The report is inaccurate in that sense? A. I had no complaints from my inmates that (511) petitions had been confiscated.

Q. On that basis you conclude no petitions were confiscated? A. That's right.

Q. It states:

"It has been reliably reported that a petition with 225 to 250 signatures is in the population."

Do you know where Mr. O'Mara got those reliable reports? A. No.

Q. Did you ask him? A. I think he got some of it from some inmates who may have given him this information, but I am not certain.

Q. You are not certain? A. No.

Q. "Several officers have reported that individual inmates expressed regret and apprehension about having signed the petition."

Do you know of your own knowledge who those officers were? A. No.

Q. It goes on:

"It is coincidental that this activity sprung (512) into being shortly after the Inmate Liaison Committee raised the subject for premium wages for off-the-institution-

grounds work. I know the ILC has disavowed any part in this activity, but I wonder about the timing."

Did you ask Mr. O'Mara any questions about this particular section of the report? A. No. I was aware of that. I meet with the Liaison Committee once a month and one of the members asked if it was possible to provide those inmates who worked on an outside project with premium wages, and I told them it would not be possible since this was a training situation and these were vocational classes and it would be very unfair to pay them one scale and pay the other inmates in the institution another scale, and they accepted that explanation, apparently.

Q. I take it Mr. O'Mara has some feeling that it might be possible that the timing of this petition was due to the Inmate Liasion Committee's concern with these wages? A. He might have been concerned. That is apparent by his statement.

Q. You were not concerned about that? A. No, I didn't think there was much bearing in that.

(513) Q. You did not speak to anybody on the Inmate Liaison Committee about this possible connection? A. No, I did not.

Q. It goes on:

"On Sunday, June 4, 1972, I received a phone call from Lieutenant McMahon informing me information had been received indicating some kind of trouble on C and D galleries at 7 a.m. I reported to the institution to assist but the rumor proved to be false. However, several officers reported they had received information that during the movie on Saturday evening there was a considerable amount of vocal expression relative to race expressed while the lights were out. Evidently the picture denoted racial conflict and some members of the population reacted to it."

I take it then there was some incident that took place during the showing of the movie that created a racial con-

flict between the inmates— A. I didn't relate this to the petition. This is something that is possible all the time. It wasn't very serious. That is the only report he made, in passing.

Q. You did not receive any other written reports about this? (514) A. No.

Q. So you concluded it wasn't very serious? A. Yes.

Q. I take it that racial conflict between inmates is a continuing concern of yours? A. Of course.

Q. And it is often a cause of hostility and tension among inmates? A. Yes.

Q. And on this Saturday it erupted into an incident? A. I don't think it could have been very much because it would have been reported if it had been. I think this was one or two or three or four people, but nothing serious enough to warrant a special report.

Q. "There was a considerable amount of vocal expression relative to race."

This was at the time the movie was being shown and it is a time of the most special concern of yours about an uprising? A. Yes.

Q. You were not concerned that there might have been this yelling back and forth about race? A. I don't think it was yelling. There may (515) have been loud talking in the movies that may have concerned one or two people.

Q. Did you take any steps to insure that in the next movie this would not occur? A. No. I didn't think it was that serious. I might mention that we had a previous movie and there was concern that there may be racial overtones as a result of the movie, and I came to the institution and talked to the inmate population before the showing of the movie, and this seemed to prevent, or hopefully prevent, problems. But we had heard rumors that there would be a racial disturbance in the movie as a result of the picture being shown.

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Q. You were aware of the possibility of some disturbance? A. I came to the facility and talked to the men before the movie was shown.

Q. And this effectively reduced some of the tension? A. I hope so. There were no problems, at any rate.

Q. You are not concerned about the vocal expression— A. No. This occurs, but as long as it is (516) nothing out of the ordinary—I think Mr. O'Mara may have been slightly concerned about it but not to the point where we assigned other officers or called off the movie.

Q. Loud discussion is not out of the ordinary— A. I would have to know what was said.

Q. Did you ask Mr. O'Mara exactly what was said? A. He got it from another officer. He was not there.

Q. Did you ask the other officer? A. No. I asked Mr. O'Mara what had been related to him and I said I didn't think it was that serious.

Q. The report goes on:

"The following named inmates have been reported as being very active circulating the petition."

You do not know who made those reports to Mr. O'Mara? A. No.

Q. You did not ask Mr. O'Mara who made those reports? A. No.

Q. And you did not yourself try to independently go to those persons and find out who circulated the (517) petition? A. No, I did not.

Q. The names listed are Sostre, Lucas, Passanante, Kenny, Oliver, Rosario, Newkirk and Rodriguez.

Next to Sostre it states, "The prime mover and instigigator." You do not know from what source Mr. O'Mara received that information? A. I think perhaps that would be observed by most of the officers who work on that shift. He has been the prime mover and instigator in any problems we had in the institution up to that time.

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Q. And you considered the union a problem? A. No, that was not the problem. The problem was the confrontation between the two groups. Circulation was not the problem.

Q. You do not know in this case specifically what reports Mr. O'Mara received that indicated Sostre was the prime mover and instigator? A. No.

Q. It states, after Mr. Lucas' name: "Reports indicate that he and Sostre in consort with Legal Aid instigated petition."

Do you know specifically where Mr. O'Mara got that information? (518) A. Would you repeat that?

Q. Yes.

"Reports indicate that he and Sostre in consort with Legal Aid instigated petition." A. Who is "he"?

Q. Mr. Lucas. This is next to Mr. Lucas' name on the report (handing).

The Court: The record should indicate that counsel is showing the witness Plaintiffs' Exhibit 12 in evidence.

A. All right—

Q. Do you know where Mr. O'Mara got those reports from or from whom? A. Probably from the—I presume from the officer, but I wouldn't know what shift it might have come from. If Mr. Lucas frequented Mr. Sostre's cell, and this might indicate he and Sostre were friendly, and then if he circulated the petition—I think it was common knowledge through the institution that you and Mr. Sostre were quite often visiting in the visiting room, and there had been some rumors about the institution prior to this time that a union may attempt to be—this was the day before, I think, after your visit to see Mr. Sostre.

Q. After that you heard that a union might be (519) formed? A. I heard this.

Q. You do not know from whom Mr. O'Mara received this particular piece of information about Mr. Sostre and Mr. Lucas and the Legal Aid Society? A. No.

Q. You don't know exactly what they said. You speculated that he and Mr. Sostre were friends, but do not know what the reports stated? A. No.

Q. Did you know if Mr. Lucas ever spoke to anybody from the Legal Aid Society? A. No.

Q. Did you check that? A. No.

Q. You do not know that Mr. Lucas was never in touch with anyone from the Legal Aid Society? A. No, I don't.

Q. It says next to Mr. Newkirk's name: "Reported by Lieutenant Connolly as actively involved in securing signatures."

Mr. O'Mara, I assume, was referring to Mr. Connolly's report?

A. I am not certain.

(520) Q. It might have been an independent discussion? A. It might have been.

Q. The last two paragraphs of this report:

"There is a rumor received from several sources that an attempt is being made to dump Barnes of the ILC and that Sostre is behind this. I have not been able to figure how this fits in with the recent activity."

Do you know where Mr. O'Mara heard this rumor? A. No.

Q. Did you ask him? A. No.

Q. Did you make any investigation of this particular piece of information? A. No. I think there was some feeling around the facility that there may have not been the most friendly relationship between Barnes and Sostre, but then this often occurs between two inmates in a facility.

Q. Was there a feeling in the institution that there was not friendly feelings between Lucas and Barnes? A. I don't know anything about that.

Q. Was there any rumor or feeling in the institution there was a conflict between Newkirk and Barnes? (521) A. Only Sostre and Barnes.

Q. Did you have any information that there was conflict between Lucas and anybody on the Liason Committee? A. Not specifically.

Q. Or any conflict between Mr. Newkirk and anybody on the Liaison Committee? A. Not specifically.

Q. I believe you stated that you asked Mr. O'Mara to find out what was happening at the institution as of that date, Monday, what the present situation was. A. I think that is what I mentioned, yes.

Q. This report I have just read only talks about the activities, at least in terms of the union, that took place on Friday, June 2nd. Can you explain why Mr. O'Mara only talked about who was active on Friday, June 2nd, as opposed to what you say you requested him to do? A. I asked him to make an investigation concerning the events of Friday, June 2nd. Nothing had occurred on Saturday or Sunday that warranted such a report.

Q. Did anything occur on Monday that warranted a report? A. By Monday there seemed to be an increase in the tension again in the institution. This is when we began (522) to notice it. We had reports that there was increasing tension. We had anticipated a reduction in tension rather than an increase.

Q. What did you yourself notice on Monday, June 5th? A. I did not circulate through the facility. I go to my office and the supervisors come to me. Anything I got was a report from them.

Q. You yourself did not notice an increase in tension? A. That is correct.

Q. What reports did you get on Monday that tension had increased? A. Reports that there was considerable tension apparenty in the institution, and this is something you have to work in a facility to recognize. This is when

small groups gather, when you pass them and the conversation ceases. There are many signs that would indicate that all is not well, that something is either being planned or there is some dissatisfaction.

Q. Specifically what evidence was mentioned to you that officers had seen that indicated tension on Monday, June 5th? A. They indicated to me that apparently there was (523) tension, and you don't ask them how. If you have worked there for a length of time you recognize it.

Q. They did not point out specific incidents that took place that indicated to them there was tension in the institution on Monday? A. No.

Q. They did not indicate particular conversations— A. They may have to their supervisors, but—

Q. To yourself? A. No.

Q. When you asked Mr. O'Mara to make out this report you had only the general statement from these officers that tension was increasing? A. This is an accumulation of whatever material he could locate or whatever information, including his own observation he had as to the climate in the institution.

Q. At the present time? A. On Monday.

Q. He doesn't mention Monday in his report? A. No. I asked him to make this report concerning Friday, but this was when I had the telephone calls from Mr. Connolly, when we had the broadcast, when we had the confrontation in front of the key room. I (524) wanted a report on the events of that evening. Apparently Saturday and Sunday was comparatively quiet and there was nothing to report.

Q. Again, though, you were not concerned about who was circulating the petition on that evening? A. No, I wasn't.

Q. This report came to you, Exhibit 12, on that Monday, the same day? A. Yes.

Q. Then did you have further discussion with Mr. O'Mara about the situation? A. Yes.

Q. When was that? A. We discussed it on Tuesday, we discussed it when Mr. Otis came back. We discussed it on several occasions.

Q. When was the next time after you received this report that you recall discussing it with Mr. O'Mara? A. I am not certain. There was a period of five days there and it is very difficult for me to establish exactly what hour or moment I was discussing this with Mr. O'Mara or Mr.. Otis.

Q. Do you recall a specific discussion after receiving this report about this report with Mr. O'Mara, (525) Exhibit 12? A. Yes. I discussed it with him. One time later I discussed it with him but it was in regards to Rodriguez. That was the only person we discussed at that time. Prior to this we discussed it to determine what should be done about the situation, was the tension resolving itself or was the tempo increasing.

Q. To the best of your recollection, when did this discussion take place? A. Monday afternoon.

Q. What did Mr. O'Mara indicate should be done about the situation? A. Mr. O'Mara thought we ought to wait a day or two and find out what happens, is this thing going to resolve itself or continue.

On Tuesday—

The Court: Did you agree with that?
The Witness: Yes, I did.

Q. Did you receive any further information from Mr. O'Mara during this discussion about the specifics that were taking place on Monday that was creating tension? A. No, just generally.

Q. You don't know the specific people involved? A. No.

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(526) Q. You don't know the specific topic of the conversations? A. No.

Q. Did you speak to anyone else on Monday, June 5th, or Monday evening, June 5th, about what was taking place in the institution on that date? A. I may have talked to Lieutenant Connolly, but I am not exactly certain that I talked to him that evening or the next evening. I am not exactly certain.

Q. Did Lieutenant Connolly, to your recollection, indicate or have information as to what specifically was creating tension on Monday, June 5th? A. No. Specifically, the confrontation or the division of the inmate population between those who believed in the Liaison Committee and they should act as their representatives or whether to have a labor union.

Q. Did Mr. O'Mara, in your conversation on Monday evening after you received this report, state to you that that was the cause of the tension? A. Yes. He felt this was a conflict between those pro-union and those pro-Liaison Committee.

Q. How did you decide who was pro-union? A. It was quite apparent that those who circulated (527) the petition would be pro-union or they wouldn't have circulated the petition. However, there were many more who circulated the petition than those whose names appeared on the sheet. We were more concerned with those who continued to vocally announce their position in relation to a labor union, how important it was that they have it, and they wouldn't let up, and I felt that this was perhaps instigated or supported by Martin Sostre and those persons friendly with him.

Q. Did Mr. O'Mara, at your meeting on June 5th, state to you the names of persons who on Monday, June 5th, were continuing to discuss the union very strongly? A. A. I don't think he specifically mentioned it in that manner.

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Q. Did Mr. Connolly, on your discussion on either Monday or Tuesday, state who specifically was continuing to very strongly discuss the union? A. He stated in his opinion those are the persons, these were the persons who he felt were continuing this argument relating to or the discussions, heated discussions, between the two organizations.

Q. We spoke about Mr. Connolly's conversation before and I don't believe at that time you stated that he (528) indicated that these persons were involved in any arguments about the union. A. He may not have personally observed it, but this was information that he probably obtained as supervisor of a shift, either through observations or by talking to inmates or through discussions with subordinate employees—I don't know how he obtained it.

Q. Do you recall if Mr. Connolly reported that Mr. Newkirk was involved in an argument with anybody? A. No.

Q. Do you recall if Mr. Connolly reported Mr. Lucas was involved in an argument with anybody? A. No, I don't.

Q. And neither did Mr. O'Mara? A. I don't recall that. These were the names submitted to me as being persons who were, in their opinion, leaders in the group pushing or working diligently to espouse union organization.

Q. Did you ask either of these men to prepare a written report as to the events that took place from Monday on at the institution? A. No.

Q. You did not consider it a serious situation? A. I considered it serious, but I was present (529) during these days and they came to my office quite frequently to discuss it.

Q. The only written report you received was about what took place on Friday, June 2nd? A. The only one I received, yes, from Mr. O'Mara.

Q. The only specific list of names you had were those involved in the circulation on Friday? A. That's right.

Q. And you used the names as an indication that these

persons were active in the union? A. I would presume those persons circulating the petitions were certainly active in sponsoring the union or indicating vocally that they sponsored the union. There were eight or ten names that were submitted and this does not include all of those who circulated petitions. This was merely the group that continued to discuss and to vocally support the union.

Q. In Mr. Connolly's report, Exhibit 2, and that concerns only Friday, June 5th, were all of the men he observed or had reports on as circulating the petitions? A. Right.

Q. Mr. Koch's report only concerned who was circulating the petition? A. Yes.

(530) Q. These two reports would be all those men they had reports on who were circulating the petition? A. I presume so.

Q. Who else was circulating the petition? A. I think there were a number of persons—you had a list of names here. I believe Coy Smith, although I don't think Coy Smith signed it, but I think he was one of the persons who signed your original petition for a union—

Q. Constitution? A. Constitution. But Coy Smith was not an agitator, created no problems, and we had no reason to even submit his name.

Q. What other reports did you receive about Friday, June 2nd, that indicated any other names besides the ones in Mr. Connolly's and Mr. Koch's report? A. Those are the only ones.

Q. You do not know of any other persons who were circulating the petition? A. I had reports that evening that a number of inmates were circulating petitions. We were not even exactly certain how many, and we didn't care. I didn't say, "Get the names of the men circulating petitions," because I didn't care. Petition-making was a common (531) practice in Wallkill.

Q. But Mr. O'Mara got you the names of people circulating the petitions? A. He got the names of those most active and those who continued to be active. I think the fact that they were circulating petitions only indicated that they were also active on Friday night as well as subsequent evenings or days.

Q. You do not have any specific reports that Mr. Lucas, for example, did such-and-such on Monday and there was his name on it? A. No.

Q. The only information we have is "The following named inmates have been reported as being very active in circulating the petition," from Exhibit 12? A. Right.

Q. I show you Plaintiffs' Exhibit 13 and ask you how that came about, if you remember. A. I asked them to submit me a list of those persons they thought were actively involved in creating this tension in the institution. This was the list they gave me.

Q. Who did you ask this? A. Mr. O'Mara.

(532) Q. When did you make this request? A. On the 6th.

Q. That would be Tuesday, June 6th? A. No, that was Monday, I think.

Q. Monday is the 5th. A. It could have been the 5th. I think I asked him Monday to prepare a list of those persons who were continuing activity.

Q. That was after you received his first report, Exhibit 12? A. I received one report on the 5th from Mr. O'Mara, and I believe I received a subsequent report with specific names on the 8th, but I am not exactly certain. But I believe that was the date I called the Albany office.

Q. This report, Exhibit 13th, has the same group of names that appear in Exhibit 12, is that right (handing)? A. Well, you have one addition, you have Passananante—oh, he is up here.

The Court: Let the record show that counsel is showing the witness Plaintiffs' Exhibits 12 and 13 in evidence and that the witness is examining them.

A. Yes, they are the same. The thing is, we have changed the order on the list. I told him to list (533) them in the order in which he thought they should be transferred if we decided to move any out.

Q. After you received this first report, Exhibit 12, you asked Mr. O'Mara if he would list in order of their continued activity the names that appear in Exhibit 12? A. Yes, the more serious troublemakers or problems we had should be the ones considered—

Q. Put the most serious ones on top? A. Yes.

Q. Did you indicate how he should go about making this evaluation? A. No. I felt he could use his own experience and judgment in doing that.

Q. But you wanted this based on those people who were creating the most tension somehow? A. That's correct.

Q. When did you receive this Exhibit 13? A. I think I probably received it on the 6th.

Q. Tuesday, June 6th? A. Yes. But I called the names into the commissioner's office on the 6th.

The Court: Could I see the exhibit, please?
Mr. Pochoda: Yes, your Honor (handing).
(534) (Pause.)
The Court: Thank you.

By Mr. Pochoda:

Q. This report, Exhibit 13, is to yourself from Mr. O'Mara, June 6, 1972. The subject is "Recommendation For Transfer."

I take it that in your discussion preceding this report, with Mr. O'Mara, you discussed the possibility that certain inmates would have to be transferred because of the situation at Wallkill? A. I thought that might become necessary, yes.

Q. You thought this conflict situation might require some persons being removed from the institution? A. That's right.

Q. And you asked him, in order of what you considered their troublemaking, to list their names? A. That's right.

Q. I read from the report:

"After consultation with Lieutenants Henry and Stark, as well as inquiries to several officers, the following named inmates are recommended for transfer in the order named."

Do you know the other officers Mr. O'Mara spoke to? (535) A. No.

Q. Did you ask him who they were? A. No.

Q. Do you know what his conversation with Lieutenant Henry consisted of? A. No.

Q. Did you ask him that? A. No.

Q. Did you know what his conversation with Lieutenant Stark consisted of? A. No.

Q. Did you ask him that? A. No.

Q. After receiving this report you yourself did not make a further investigation as to whether this order was correct? A. No, I did not.

Q. The list, and I will read it in order: No. 1, Sostre; No. 2, Lucas; No. 3, Newkirk; No. 4, Rosario; No. 5, Rodriguez; No. 6, Oliver; No. 7 Kenny; No. 8, Passanante. This is from Exhibit 13.

Why was Mr. Lucas placed second and Mr. Oliver placed sixth? A. I don't know. You would have to ask Mr. (536) O'Mara.

Q. What did Mr. Newkirk do on Monday, June 5th, that was different from what Mr. Kenny did on Monday, June 5th? A. I don't know.

Q. Do you know what Mr. Newkirk did on any of the days prior to this report that was different from what Mr. Kenny did? A. I couldn't answer that.

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Q. Do you know what Mr. Newkirk did on any of the days different from Mr. Passanante? A. I don't know.

Q. Do you know how Mr. Lucas' behavior was different from Mr. Passanante's or Mr. Kenny's? A. I don't know.

Q. What time of the day did you receive this report? A. I don't remember exactly.

Q. Approximately, if you recall. A. I would say in the afternoon some time.

Q. Tuesday afternoon, June 6th? A. Yes, I would say so.

Q. When did you make your phone call to Albany? A. I am not sure about that. It might have been (537) some time during the afternoon.

Q. Some time during Tuesday afternoon? A. Right.

Q. It was— A. I don't recall the exact time that I made the calls.

Q. It would have been within a matter of two or three hours after you received this report? A. I would presume so, yes.

Q. Did you have further discussions with Mr. O'Mara about who should have been transferred? A. No.

Q. After you received this, this was the extent of Mr. O'Mara's involvement in the decision? A. That's correct.

Q. Did you speak to anyone else after receiving this report and before you made your phone call about who should be transferred? A. No, I don't believe I did.

Q. Prior to receiving this report on Tuesday, June 6th, did you speak to any other officials about who should be transferred? A. I spoke to Mr. Otis, but I don't recall exactly when I spoke to him, Mr. Otis not having been present, (538) and he was only taking Mr. O'Mara's report, as it were. I did not consider Mr. Otis was that important, except whether or not he agreed with this, and he did agree with it, but I am not exactly certain what time I discussed it with him.

Q. Do you believe it was Tuesday? A. I am not certain

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when. Mr. O'Mara had been acting deputy superintendent when this occurred and on the Monday following the weekend, and most of my conversations were with him. Mr. Otis just took over when he came back to duty. He prepared the written reports for the Albany office.

Q. Did you speak to anyone else about who should be transferred? A. No, sir.

Q. Isn't it true that Mr. Otis was on vacation and didn't return until Wednesday morning? A. That's possible.

Q. It was after the time you called Albany? A. Yes, apparently it was, if you say he came back Wednesday.

Q. You said earlier that the tension was created because of a conflict between two groups. You did not receive any names of any persons on the Liaison Committee (539) involved in the arguments? A. No.

Q. Did you ask any of the persons making these investigations for you who on the Liason Committee was the most vocal? A. I don't recall. I think that Barnes may have been quite vocal, but I don't recall asking specifically whether they were or not.

Q. You did not ask Mr. O'Mara, Mr. Connolly or Mr. Otis to investigate who on the Liaison Committee was most vocal in these arguments against the union, did you? A. No.

Q. When you received this report, Exhibit 13, from Mr. O'Mara on June 6th, did he indicate to you any specific incidents that Mr. Newkirk was involved in on Monday or Tuesday, June 5th or 6th, that led him to put his name down on this particular list? A. I think that is the same question you asked me before, but I still say no.

Q. Did he have any specific incidents that Mr. Lucas was involved in on Monday or Tuesday, June 5th or 6th, that led to putting his name down on the list? A. I wouldn't know whether he had any knowledge of (540) specific instances. He did not relate them to me.

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Q. What did you believe when you received this report that Mr. Lucas was doing that required his transfer if you had no knowledge of specific actions he was engaged in? A. I was governed by the recommendations of a subordinate supervisor who had a great deal of experience in correctional work, is a deputy superintendent, has about 30 years of service, and he must have observed or obtained information that caused him to make these recommendations.

Q. It is a serious thing to be transferred from Walkill, is it not? A. Not always.

Q. When it is done against an inmate's will it results in serious deprivation? A. If time allowance is lost as a result, yes.

Q. You would agree none of the persons on this list, to your knowledge, at this date wanted to leave Wallkill, did they? A. No, I don't believe they did.

Q. When you received this report, if you would, what behavior did you envision that Mr. Lucas had engaged in on Monday and Tuesday, June 5th and 6th, that necessitated his removal from the Wallkill Correctional Facility? (541) A. I presume that he as a follower of Sostre was promoting dissent and trouble in the facility, that he was creating or attempting to create problems or trouble within the institution, and since he was so very closely allied with Sostre, from the reports submitted, this is what I felt he was doing.

Q. The reports are the ones we referred to? A. And others, verbal reports, prior to the circulation of the union petition, and they were friendly and allied with Sostre in the institution.

Q. This was from information you received prior to that time— A. I think they were influenced by that knowledge.

Q. Would that be the same for Mr. Newkirk? A. Yes.

Q. And everybody on this list? A. All of them were, to a degree, very friendly with and considered by him as followers of Martin Sostre in the facility.

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Q. But you yourself had personal knowledge of the relationship between Mr. Lucas and Mr. Sostre? A. No. Only that reported to me.

Q. Do you know how friendly Mr. Newkirk was with Mr. Sostre? (542) A. Only what has been related to me.

Q. What was related to you about Mr. Newkirk's relationship with Mr. Sostre? A. That he was quite often visiting with Mr. Sostre in his cell in the evening —

Q. Who related that to you? A. The supervisor on the 4-to-12 shift.

Q. Mr. Connolly? A. Yes.

Q. That was prior to June 2nd? A. Yes.

Q. You became suspicious of Mr. Newkirk for that reason? A. Not suspicious. I had this prior information and I presumed that he was again carrying out the wishes of Martin Sostre, to create problems, if he could. I felt that this should have died a natural death, that once the petition was submitted and sent to whatever areas it should have done, that then this should have waited for activities in the courts to decide whether or not we would have a union. There was no need to continue the discussion, but it didn't stop.

Q. Do you know how many signatures were obtained on June 2nd? (543) A. No.

Q. Or on Saturday and Sunday? A. No.

Q. Or on Monday? A. No.

Q. You had no idea if the requisite number of signatures had been obtained? A. No. I don't know how many were obtained or whether they stopped obtaining them. I presume they had all they wanted on Friday, or maybe Saturday.

Q. Did you ask any of the inmates or even any of the lawyers involved with this whether they had obtained the requisite number of signatures? A. No.

Q. You did not ask if they had finished that particular

stage of the process in terms of certification of the labor union at Wallkill? A. No, I didn't.

Q. What specific acts you felt Mr. Lucas might have been doing—what specific acts did you believe Mr. Lucas was doing on Monday and Tuesday that required his removal from the Wallkill Correctional Facility? A. Again, I was governed by a recommendation by a subordinate supervisor who had many, many, years of experi- (544) ence in the correctional field. Perhaps this man was advocating whatever to form a union and what might the results be, the advantages to the inmate population as the result of an inmate union, and some inmates feel there might be many, and this kept the thing going, the pot boiling, and I am presuming this is what happened. I have no personal knowledge that this is what he said or did.

Q. You are presuming that strong advocacy were some of the acts Mr. Lucas and Mr. Newkirk did on Monday and Tuesday? A. Yes.

Q. And this is what kept the pot boiling and kept the tension between the groups? A. That's right. I might mention—

Q. If you would just answer the questions, please.

Who did you speak to when you called Albany? A. Gene Phillips.

Q. What did you state to him? A. I told him we had a problem at Wallkill and it may be necessary to transfer some inmates to another institution, and I explained to him what the problem was.

Q. What did you tell him was the problem? (545) A. I told him that we had a group of inmates who were sponsoring an inmate union and they had circulated the petition and we felt that was the end of it, but it wasn't, that the problem was continuing, that there was a great deal of tension and friction, and we felt the only way it was going to be corrected was to move some of the men out without any kind of disciplinary action taken.

Q. What did Mr. Phillips say? A. He told me he could call me back. I gave him the names and he called back and told me I could move them.

Q. When did he call you back? A. I believe it was on Thursday—no, I believe Wednesday afternoon, because we moved the group to Clinton on Tuesday.

Q. Your call was made probably late Tuesday afternoon? A. Late Tuesday or early Wednesday. It probably was Wednesday.

Q. You think the court was Wednesday morning? A. It could have been. I am not certain.

Q. Just again to make it clear, prior to that call, if it was Wednesday morning, you didn't have further (546) discussions with persons at Wallkill, correction officials, about who should be transferred? A. I probably discussed it with Mr. O'Mara. When I come to work in the morning, Mr. O'Mara and Mr. Otis come to my office to discuss problems they have.

Q. You think you may have had a discussion with Mr. O'Mara on Wednesday morning, June 7th? A. Possibly, or Mr. Otis.

Q. Mr. Otis had just returned? A. Right.

Q. And he had no knowledge of the whole situation? A. That's correct.

Q. Do you recall what was stated at that conversation with Mr. O'Mara on Wednesday morning? A. Nothing, except that it would be probably necessary to move them and how we were going to move them.

Q. You were concerned with the mechanics of the transfer? A. That's correct.

Q. There was nothing further you and Mr. O'Mara observed on entering the institution on Wednesday morning that altered your initial decision? A. Only that the tension was quite apparent and (547) we would have to do something about it.

Q. Again you had no first-hand information as to what this tension was? A. No.

Q. And you believe you received a call back from Mr. Phillips on Wednesday afternoon? A. Some time Wednesday, advising me that the transfer had been approved and where they were going to go, because they select the institution that you transfer to. We have nothing to do with that.

Q. At that time he told you that Mr. Newkirk and Mr. Lucas were heading for Clinton? A. And Mr. Rosario.

Q. And Mr. Rodriguez and Mr. Oliver were going to Auburn? A. Yes.

Q. Did you have any further contact with Albany after that concerning these transfers? A. No.

Q. So the only contact with Albany was your one phone call on Wednesday morning, you believe, and the return call on Wednesday afternoon? A. Right.

Q. I show you Exhibits 7 through 11 in evidence. (548) When were these prepared? A. Probably Mr. Otis upon his return to duty. I don't know the exact time.

Q. Do you recall why Mr. Otis prepared these? A. It is necessary to prepare them. You may get verbal permission in an emergency, but it has to be followed by—this is unusual. Generally it is done by correspondence. It was done by phone in this case and there had to be supporting documents to consummate the transaction.

Q. These were prepared to go to Albany? A. That's right.

Q. And they were the official record of the reasons for the transfers? A. Right.

Q. And so that these reports were just recording for the books, if you will, the reasons you had discussed, is that right? A. Yes.

Q. Looking at Exhibit 8, this is one of those reports that we were talking about that was prepared for Albany giving the reason for the transfers (handling)? A. Yes.

Q. This is a report dated June 8, 1972, to Mr. (549) Butler from Mr. Otis. Why is this addressed to you if it was supposed to go to Albany? A. All of them are transmitted with a facing letter to the Albany office. It came from him and I transmitted it.

Q. The subject is No. 9704, James Newkirk, Jr., and it states:

"A petition relative to a prisoners' labor union was widely circulated among the population for signatures on Friday evening, June 2nd, and Saturday, June 3, 1972. No. 9273, Sostre, Martin, was the prime mover and instigator. No. 9704, Newkirk, has been actively securing signatures for the petition. I recommend that Newkirk be transferred to another institution because he is disrupting the orderly operation of the institution."

And then the last paragraph:

"As a result of the petition being circulated, there has been a division between the inmate population and there is great animosity between that group which circulated the petition and the Inmate Liaison Committee and their followers. We cannot permit an altercation to develop."

This report you believe was prepared—do (550) you know when it was prepared, Tuesday or Wednesday? A. I don't believe it was prepared on Tuesday. If he didn't come back until the Wednesday, he couldn't prepare it on Tuesday.

Q. Wednesday, then, June 7th.

Again, as I read, is it true, then, that the major factual—the only factual or specific incident they mention Newkirk was involved in was the one of securing signatures for the petition? A. That is what he stated there. But he also stated in his last paragraph the basic reason for requesting the transfer.

Q. The altercation that might develop? A. Yes.

Q. And you say this was developing because of the circulation? A. Yes.

Q. And because the altercation was developing as a result of the circulation and because Mr. Newkirk was involved in that circulation you felt Mr. Newkirk should be transferred? A. Not just because he circulated the petition but because of his continuing activity beyond the circulation of the petition itself.

(551) Q. This document doesn't indicate anything about that continuing activity? A. No.

Q. Did you feel you should tell Albany the real reasons for transferring— A. I talked to them by phone and I am not interested in any men losing time, but I merely felt that in the best interests of the institution and themselves it was necessary to move them out.

Q. You felt that if you gave the real reasons for the transfers of these men they might result in them losing time? A. I wasn't taking disciplinary action. I didn't want an altercation between rival factions at Wallkill.

Q. I want to get at why you didn't include the real reasons for the transfer. A. That was Mr. Otis' report to me. I submitted it to Albany. I had discussed it with them. I didn't perhaps indicate by letter but I did indicate I wanted no disciplinary action taken and I felt this was a measure that had to be taken quickly.

Q. What did you indicate to Albany exactly that Mr. Newkirk had done besides circulating the petition? (552) A. I told them I thought this thing would resolve itself perhaps earlier than at the present time, but it didn't, and this continued and I felt something had to be done. We had another movie coming up Saturday and I was fearful of trouble, and so were the other supervisors, and we decided to do something. As soon as these men left the institution it stopped immediately.

Q. After they left the institution there was no further talk about the union, was there? A. None whatsoever.

Q. But you did not state to Albany in any of the conversations any specific acts or any actions they were involved in except the circulation of the petition? A. From the information I had gotten from the supervisors, I felt this was the necessary step to take.

Q. Albany did not request reasons why the men were to be transferred? A. No. They permitted me to make the selection.

Q. They did not ask for further reasons? A. No.

Q. And it states in this report that "As a result (553) of the petition being circulated, there has been a division," and you are stating that is not exactly the case, it is a result— A. This is what created a division between the Liaison Committee and the population—

Q. The circulation of the petition? A. Not just the circulation of the petition. The people who were promoting it and trying to sell it to the population, more so than just the circulation—the circulation was over and done with—

Q. When you say as a result of the petition being circulated there was a division, Mr. Otis should have said as a result of the petition and other activities, is that right? A. Possibly.

Q. Is that right or not? A. Other activities relating to the circulation of the petition.

Q. Such as telling people that it is a good idea? A. Yes.

[At this time the Court recessed for lunch.]

(556) AFTERNOON SESSION

(2:30 p.m.)

The Court: Good afternoon.

Supernntendent Butler, would you resume the stand, please.

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HAROLD N. BUTLER resumed.

Cross Examination continued by Mr. Pochoda:

Q. We have been talking about Plaintiffs' Exhibit 9, Mr. Butler, which I will show to you again. I would like to show you Plaintiffs' Exhibit 8 also (handing).

Exhibit 8 was also prepared by Mr. Otis, is that right? A. Yes, both of these were prepared by Mr. Otis.

Q. And it would be true that it would be prepared in the same manner and for generally the same reasons as Plaintiffs' Exhibit 9? A. Right.

Q. Is it true that the first two sentences of the first paragraph are identical in both of those reports?

Perhaps it would be easier if I read one of them and you could follow it. I will read from Exhibit 8:

(557) "A petition relative to a prisons' labor union was widely circulated among the population for signatures on Friday evening, June 2nd, and Saturday, June 3, 1972."

Is that the same as Exhibit 9? A. Yes.

Q. "No. 9273, Sostre, Martin, was the prime mover and instigator."

Is that the same? A. Yes.

Q. Then there is a different sentence relating to Mr. Lucas, and one to Mr. Newkirk.

Going to the second paragraph:

"I recommend that Newkirk be transferred to another institution because he is disrupting the orderly operation of the institution."

Is that the same in Exhibit 9? A. No. This doesn't indicate the inmate by name. It says "this inmate."

Q. Is the rest of the language the same? A. Right.

Q. Then I read from the third paragraph—that is the extent of the second paragraph? A. Yes.

(558) Q. "As a result of the petition being circulated

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there has been a division between the inmate population and there is great animosity between that group which circulated the petition and the Inmate Liaison Committee and their followers. We cannot permit an altercation to develop."

Is that the same in Exhibit 9? A. Yes.

Q. The only differences are in Exhibit 8 it refers, at the end of the first paragraph, and states: "9704, Newkirk, has been actively securing signatures for the petition," while in Exhibit 9 it states: "Reports indicate 9659, Lucas, Cornelius, and 9273, Sostre, in consort with Legal Aid, instigated the petition."

Those are the only differences? A. Yes.

Q. Isn't it also true that that language came directly from a prior exhibit, which I will show you, and that is Exhibit 12, which is a report from Mr. O'Mara, and I show you the second page, and would you please read what it states next to Mr. Newkirk's name. A. "Reported by Lieutenant Connolly as actively involved in securing signatures."

Q. That is slightly different from Exhibit 8? (559) A. Yes.

Q. Would you read what it states after Lucas name? A. "Reports indicate he and Sostre in consort with Legal Aid instigated petition."

Q. That is the same as appears in Exhibit 9? A. That's correct.

Q. I would like you, if you could, to quickly look at Exhibits 7, 10 and 11. These are also reports from Mr. Otis. Exhibit 7, the subject is Roman Rosario and 10 is Carl Oliver and David Rodriguez, and Exhibit 11 is just David Rodriguez.

The first two sentences—

Mr. Hoffman: I would like to object, your Honor. These documents are in evidence. If counsel wishes

to show similarity of language, I don't think he has to ask the witness to read these documents.

The Court: That's correct. The documents are in evidence and they speak for themselves, and before rendering a decision the court will not only read the documents but will accept any comments in the form of posttrial briefs or findings and conclusions from counsel which should specifically direct the court's attention to either similarities or dissimilarities.

(560) Mr. Pochoda: I will withdraw the last question, your Honor.

By Mr. Pochoda:

Q. I would like to show you again Exhibit 13. This is the one referred to where Mr. O'Mara made the list of persons in order of who he felt should be transferred? A. Right.

Q. Can you tell us the date Mr. Sostre was transferred from the institution? A. I don't have the exact date, but it was some time later.

Q. Do you know approximately, in days or weeks, how much later it was? A. Several months—at least a month, I would presume.

Q. Can you tell us why you decided to transfer five inmates and not six inmates? A. We had requested the transfer of Martin Sostre on numerous occasions for disciplinary actions, for numerous reasons, and the department decided not to transfer him because they felt that he could create less problems in Wallkill than in any other institution of the department.

(561) Q. The department felt it was less likely he would create a problem in Wallkill? A. Yes. We indicated he was one of the parties responsible for this, but they did not choose to transfer him.

Q. You asked for the first six names on the list to be transferred and they okayed only the five without Mr. Sostre? A. Right.

Q. Why did you not ask for the first seven names on this list to be transferred? A. Because after discussing it we decided that perhaps he was not as actively involved following the circulation as the others.

The Court: Indicating who, when you say "he"?

The Witness: Passanante is one, Kenny is another.

The Court: When you said "he" you would have meant "they," and you meant those two individuals?

The Witness: Yes.

By Mr. Pochoda:

Q. As I recall your testimony this morning you stated that you did not know at the time you discussed this (562) Exhibit 13 what the differences in Mr. Kenny's behavior was and Mr. Lucas' behavior was in any respects from Friday through Wednesday. A. I did not personally. I had to discuss this with my supervisory staff because they are the ones in contact with the officers and who had an opportunity to observe the inmates.

Q. You, I assume, were referring to the conversations with Mr. O'Mara and Mr. Connolly? A. That's correct.

Q. And they said to you that Mr. Kenny was not as actively involved as Mr. Newkirk, for example? A. They listed them in the order of performance for transfer.

Q. And you decided to transfer only Nos. 1 through 6, and not 7 or 8? A. Two through 6, I believe.

Q. Well, Mr. Sostre was denied. Did you ever consider transferring only 2 through 5 and not Mr. Oliver, for example? A. No. These were the names submitted to me and we discussed it and decided out of the eight we would ask for the five to be transferred.

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Q. You felt the removal of these five would reduce (563) tensions? A. We thought it would, yes.

Q. Did you discuss at all the possibility that removal of only four people might reduce the tensions in the same manner? A. No. We wanted to know how many we would have to remove in order to quiet the institution.

Q. And you decided you would have to remove about five to quiet the institution? A. This is what we decided upon.

Q. And again you do not know what Mr. Rodriguez did any different from what Mr. Oliver did? A. That's correct.

Q. You just felt the number five would be enough to handle this particular situation? A. No, I just think it was considered by those who I depended upon for information that his attempt to influence the population was not as great as the others.

Q. Mr. Rodriguez and Mr. Oliver were both transferred— A. I am talking about Mr. Kenny and Mr. Passanante. We graded them in order of importance for transfer.

Q. I see. You again can give no specific examples (564) as to what Mr. Oliver did that Mr. Kenny did not do? A. No, I cannot.

Q. And you do not know in any of these conversations, loud talks, or whatever, that took place who might have started the conversation? A. No.

Q. You don't know if it was started by somebody from the Liaison Committee or somebody on this list?

Mr. Hoffman: The witness said he doesn't know, your Honor.

The Court: I submit the answer was given. Do you press the last question?

Mr. Pachoda: No. I withdraw it, your Honor.

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By Mr. Pachoda:

Q. You stated that you took into account some of the prior information that you had about the individuals who were recommended for transfer prior to June 2nd and that information was their relationship to Mr. Sostre. A. Only one individual. Sostre himself was the only one who had been recommended to transfer prior to June 6th.

Q. But you also stated that when evaluating the transfers of Mr. Lucas and Mr. Newkirk you took into con- (565) sideration their relationship with Mr. Sostre? A. Yes, we did.

Q. Was this information written on their records in any way, this particular piece of information about their relationship to Mr. Sostre? A. There was a time in the institution when daily reports were submitted concerning the association of Mr. Sostre because we considered him a prime source of trouble.

Q. And you have some daily reports that indicate there is a relationship between Mr. Newkirk and Mr. Sostre? A. There may be some prior reports to that extent. I got it from the supervising officers who indicated to me that there had been a frequency of visitation by these people and Mr. Sostre in his cell, on the cell blocks, and so forth.

Q. It is also your testimony that Mr. Sostre was actively speaking to a number of inmates? A. Yes.

Q. When you were making the decision to transfer these inmates did you take into account their disciplinary records at the institution? A. Yes.

(566) Q. Didn't they have excellent disciplinary records at the institution? A. Yes, they did.

Q. And in fact they had never had to be responsible to or warned by any persons—

Mr. Pachoda: I will withdraw that.

Q. Besides the disciplinary records, did they have problems that resulted in any discussions or warnings? A. Some of them had had minor—I am not exactly certain, but there were minor problems, I believe, that they had been involved in, but not of any major proportion.

Q. So their records did not indicate any problems at the institution at all? A. That's correct.

Q. And their records did not indicate that they had not adjusted well to the institution? A. That's right.

Q. And in fact they were participating fully in the institution's programs? A. Some of them were involved in programs, but I think not all of them. I don't believe Mr. Newkirk was at this time involved in a program, although he had (567) been.

Q. Well, he had been working full time? A. He was working full time.

Q. And he was playing in the band? A. Yes.

Q. So he was active in activities that Wallkill offered? A. Right.

Q. Did you attempt to inquire into the past records of some of the inmates on the Liaison Committee as to their propensity for getting into trouble or violence or so forth? A. I don't think it was greater or less even than the other inmates. We have very few disciplinary problems in the institution.

Q. When you had these discussions with Mr. O'Mara, did you inquire as to the possible participation of Mr. Barnes, for example, in some vocal discussions? A. No, I did not.

Q. You did not consider that relevant at this point to the transfer? A. I considered the fact that the Liaison Committee was an elected group of people, elected by the inmate population in the institution, not by myself.

(568) Q. Wasn't it possible through that even if elected their activities might have been something you disapproved of? A. It's possible.

Q. But you inquired only as to the persons involved with the union in terms of this particular conflict? A. From the reports I got from the supervisors, the subordinate supervisors, was that they were pressing the action. The proponents or those who supported the union suggestion were the ones that were agitating, creating the problems. This is the way it was related to me.

Q. Did you attempt at any time to talk to any of the individuals who were listed on Exhibit 13? A. No.

Q. Did you attempt to talk to any person in the Liaison Committee to find out what was going on? A. No, not with the exception of talking to Barnes that night.

Q. That was the one time on the phone? A. That's correct.

Mr. Pachoda: Please mark this for identification.

(569) (Plaintiffs' Exhibit 30 was marked for identification.)

By Mr. Pachoda:

Q. I show you Plaintiffs' Exhibit 30 for identification and ask you if you can describe what that is. A. This is a report on the misbehavior or the disciplinary report on Warren Barnes.

Mr. Pachoda: I would like to offer this into evidence at this time.

(Pause.)

Mr. Hoffman: Your Honor, I notice that the last entry on this document is April 5, 1972, which is approximately two months before the incidents involved in this lawsuit and I object to the introduction of this document on the grounds that it is immaterial and irrelevant to the issues before the court.

The Court: May I see the document, please?

(Handed to court.)

(Pause.)

The Court: I would rule that the objection would go to the weight of the document and therefore I will overrule the objection and admit the document into evidence and, having done so, I will note I am aware that it covers a period which appears to have begun in 1968 (570) and the last entry appears to be some month, month and a half prior to the first of the dates which are under discussion here. The last entry is April of 1972, with testimony having been given here as to events which seemed to have begun in May of 1972.

With that observation I will overrule the objection and admit Plaintiffs' Exhibit 30 into evidence.

(Plaintiffs' Exhibit 30 was received in evidence.)

By Mr. Pachoda:

Q. Mr. Butler, looking at Exhibit 30, which has just been received into evidence, it states that on 4/5/72—

The Court: I might interject that this exhibit speaks for itself, and I have not interjected previously, but I would suggest that if you have to quote from the exhibit to ask a question that is one thing, but it is not necessary for you to read the exhibit, which speaks for itself, or to ask the witness to characterize it.

Mr. Pachoda: Yes, sir.

Q. It states that on 4/5/72 Mr. Barnes, after an Adjustment Committee appearance, was given the sentence or sanction, whatever, of one week confinement to cell (571) and 30 days loss of commissary privileges.

I take it that is a fairly serious punishment at Wallkill? A. No.

Q. Is that an average punishment? A. Yes. There is no locked cell and he is confined to his cell area, and the lack of commissary privilege, although it might be something they dislike, I would say this is a fairly common method of punishing.

Q. And that would be the same then for his sentence on 4/5/72, one week confinement for the offense of lying to the Adjustment Committee, is that right? A. That perhaps would be fairly serious.

Q. In evaluating your decision as to transferring these two plaintiffs did you make any calls to any of the other guards in the institution that they had come into contact with? I take it you did not call the instructor in the auto mechanic shop about Mr. Newkirk? A. No.

Q. You did not call the Catholic chaplain about Mr. Lucas? No.

Mr. Hoffman: Your Honor, I object. The superintendent testified that he relied on the reports (572) of his subordinates.

The Court: Well, I will permit the answers interposed to stand, if counsel is finished with this line of questioning, and we can go on.

Mr. Pachoda: I had, your Honor.

The Court: That's fine. The objection is overruled.

Mr. Pachoda: I would like this marked for identification, please.

(Plaintiffs' Exhibit 31 was marked for identification.)

By Mr. Pachoda:

Q. I show you Plaintiffs' Exhibit 31 for identification and ask you if you have seen that before. A. Yes. I wrote this letter.

Harold N. Butler—Defendant—Cross.

Q. On the date of July 13, 1972? A. I presume so. I don't remember the date that accurately but it is on the letter and I presume that is an accurate date.

Mr. Pachoda: I would like to offer this at this time.

(Pause.)

Mr. Hoffman: No objection.

(Plaintiffs' Exhibit 31 was received in evi- (573) dence.)

By Mr. Pachoda:

Q. I take it that at some point subsequent to the transfers we have been discussing you received some new information about Mr. Rodriguez? A. I received a long, lengthy letter from inmate Rodriguez from Auburn, and we had continued to investigate the situation even after the transfers, and I came to the conclusion, after talking with Assistant Deputy Superintendent O'Mara and Mr. Connolly that perhaps Rodriguez was not as actively involved in the conditions of the circulation of the petition as was originally thought and I didn't want him to suffer any penalty or punishment as a result of this, and I went beyond this. I even, since he wanted to get closer to New York—I asked if they would consider transferring him to Green Haven so that his mother could visit more easily, and he was subsequently transferred there.

Q. You had never received any information, if I recall correctly, that Mr. Rodriguez himself had been involved in the circulation of the petition.

I show you Exhibits 2 and 3 and Mr. O'Mara's report, and the only name that doesn't appear is Mr. Rodriguez'. (574) A. Yes, on this one (indicating).

Q. And the second one? A. This is from Koch. Koch only mentions one and Connolly only mentions five.

Harold N. Butler—Defendant—Cross.

The Court: Let the record reflect that the witness is referring to Plaintiffs' Exhibits 2 and 3 in evidence..

Q. Isn't it true that Exhibit 3 mentions both Mr. Lucas and Mr. Passamante? A. Oh, yes, Lucas and Passanante.

Q. And in Exhibit 3 Mr. Connolly mentions five names? A. Yes.

Q. Those seven of the eight names, the only one missing is Mr. Rodriguez? A. Yes.

Q. You had not received information that Mr. Rodriguez was circulating the petition on Friday night, June 2nd? A. I don't recall if I did. If I did, it was an oral report. But I did receive a report that he was active in supporting the union after the petitions had been circulated and in the days following.

Q. After the transfer you received this lengthy (575) letter from Mr. Rodriguez? A. Yes.

Q. And then there were continuing investigations and you discovered that Mr. Rodriguez was not as active as you had first thought? A. Rodriguez had been rather active in his association with the Spanish-speaking group in the institution, and this was his involvement, in so far as we were concerned, with the Spanish-speaking population.

Q. You felt Mr. Rodriguez was the liaison between Mr. Sostre and the Spanish-speaking population? A. Yes.

Q. And on that basis you felt he was involved with the union— A. Not on that basis alone.

Q. I take it that if you were aware of this further information about Mr. Rodriguez prior to the transfers, Mr. Rodriguez might not have been transferred. A. He might not have been.

Q. After you received this information through these continuing investigations you felt it was important to write this letter to Mr. Henderson, the superintendent at Auburn? (576) A. Yes.

Mr. Hoffman: Your Honor, I object to any further questions on this. Rodriguez is no longer before the court.

The Court: I have reason to think counsel has finished his inquiries relative to Mr. Rodriguez.

Mr. Pachoda: I have two questions and I think it is relevant, your Honor.

The Court: Let me hear the questions.

By Mr. Pachoda:

Q. You also stated in the letter of July 13, 1972 that this new information you received should be made available to the persons who were preparing the parole summary for Mr. Rodriguez?

The Court: The letter speaks for itself.

Q. You felt it was important for the people who were going to be judging whether Mr. Rodiriguez should get parole or not should have this information? A. I didn't think it would hurt him to have this in his file.

Q. It was possible that the Parole Board would hold it against him—

Mr. Hoffman: Objection.

The Court: Sustained. Have the record note (577) that the last objection was sustained and the answer can be stricken.

Q. Returning to the week of June 3, 1972, at the institution, your decision to transfer was made early in that week. It is true, is it not, that for the rest of the week Mr. Lucas and Mr. Newkirk performed their usual duties and routines at the institution? A. I don't say the decision was made early in the week. The investigation transpired early in

the week but the decision was not made to transfer until Wednesday.

Q. After Wednesday it is true Mr. Newkirk and Mr. Lucas were performing their regular activities at the institution? A. Yes.

Q. Mr. Newkirk was driving his truck as usual? A. Yes.

Q. Going in and out of the prison grounds as usual? A. Yes.

Q. You did not attempt to interrupt those activities? A. Absolutely not.

Q. You had no reason to believe Mr. Newkirk, (578) going about in the same manner, would create problems for the institution? A. Not unless I advised him he would be transferred.

Q. You felt if you told him he would be transferred something might occur? A. I feel this is always possible.

Q. Specifically in terms of Mr. Newkirk's case, did you feel he might try to escape? A. I don't believe Mr. Newkirk was an escape risk or he wouldn't have had the job or assignment had, but sometimes people act unusual under certain conditions.

Q. Did you have any specific evidence that Mr. Newkirk would act unusual in light of his record, Mr. Newkirk's record, when informed that he was going to be transferred? A. I would say there would be serious doubt in my mind as to how he would react if this information were given to him. He is a human being.

Q. I am talking in terms of his record at Wallkill and other institutions. Is there anything you looked at that you were concerned about in this particular case and therefore did not want to tell him? (579) A. Not any more than any other inmate, excepting that he was outside the walls working, for one thing. His was an outside assignment, driving throughout the area, and, of course, if he decided not to stay, he could very easily leave.

Q. And I assume the same is true for Mr. Lucas, there was nothing in his record that made you feel you were taking some risk in terms of telling him he would be transferred? A. All of the men were selected and brought there because they generally had pretty good records. So I would say this applies to almost every man in the institution. But as a precautionary measure this is the way it is generally handled.

Q. I understand that. I take it also that at no point during that week, from Monday, the 5th, until the 8th, did you speak to the population in any way about the union situation? A. No, I did not.

Q. Or make any written or oral announcements to the the population? A. No, I did not.

Q. Did not take any steps similar to the ones you described when you thought there would be racial conflict? (580) A. No.

Q. You did not try to arrange a meeting between the Liaison Committee and the people you identified as involved with the union? A. I didn't want to pit one group against the other.

Q. You did not feel it was possible that a meeting where you were present could resolve some of the differences? A. I doubt that the outcome would have been successful.

Q. You did not attempt it? A. No, I didn't.

Q. I take it you did not take any steps whatsoever to isolate any of these inmates in the rooms available, I believe, in the hospital, either Mr. Lucas or Mr. Newkirk, during that week? A. We have only two rooms in the hospital and they are usually reserved for persons who are dangerous to themselves or to other people, such as a person who has been considered psychotic or perhaps two people engaged in a violent assault and we have to separate them until we can move them out. Those rooms are not used at any other time.

(581) Q. You did not consider Mr. Lucas and Mr. Newkirk dangerous to other persons? A. No.

Q. You did not feel they were threatened physically? A. No.

Q. Or that they were a threat to anybody else? A. No, I did not.

Q. You also testified, I believe, on direct that you had no participation in the decision as to where Mr. Lucas or Mr. Newkirk were going to be sent? A. That's right.

Q. You did not in any way attempt to influence that decision, did you? A. No, sir.

Q. You did not attempt to try—

Mr. Pachoda: I withdraw the question. You did not feel it was your duty to attempt to perhaps allow them to be as close to New York City as possible even though they had left Wallkill?

Mr. Hoffman: I object to that.

The Court: Sustained.

Q. I take it you had no preference as to where they were sent? (582) A. Well, I generally, in all requests for transfer—in all requests I am not permitted to indicate the institution I would like them to be transferred to. This is a decision to be made by Albany, because of vocation, because of the program. I am not acquainted with this and I am not permitted to do this.

Q. You testified there had been numerous petitions in the past that were passed around at Wallkill? A. Yes.

Q. Are you aware of a petition that was passed around in October of 1971 that had to do mostly with various laws that affected the equal protection of prisoners? A. Yes.

Mr. Pachoda: I would like this marked for identification, please.

(Plaintiffs' Exhibit 32 was marked for identification.)

Q. I show you Plaintiffs' Exhibit 32 for identification and ask you if this is the petition to which you just referred? A. I never saw the petition. I was advised a petition had been taken up and sent to the commissioner's office. The commissioner talked to me about it. (583) I did not see it go out. I merely knew it was being circulated. I did not have a copy of the petition. It was not presented to me.

Q. You were aware, were you not, that Martin Sostre was involved in that petition? A. Yes.

Q. You were aware Mr. Larry Usher was involved in that petition? A. No.

Q. Were you aware Mr. Gary Burroughs was involved in that petition? A. No.

Mr. Hoffman: I object on the grounds of relevance, your Honor.

The Court: Yes, I don't see the relevance unless you get to the point of the plaintiffs in this proceeding having been involved in the petition. I think the fact that others not party to this lawsuit were involved in a prior petition is not germane to the issues here.

Mr. Pachoda: I am not going to offer it at that point, your Honor, and I won't go into it at this juncture.

Q. Just to turn briefly to a couple of other (584) matters, Mr. Butler—

Mr. Pachoda: May this be marked for identification, please.

(Plaintiffs' Exhibit 33 was marked for identification.)

By Mr. Pachoda:

Q. I show you Plaitniffs' Exhibit 33 and ask you if you are familiar with this document? A. Yes.

Q. Can you describe what that is? A. This is a description of the Wallkill program, briefly. I have not read it right now, but I think it is fairly accurate.

Q. You have seen it before? A. Yes.

Mr. Pachoda: I would like now to introduce this into evidence.

(Pause.)

Mr. Hoffman: No objection.

(Plaintiffs' Exhibit 33 was received in evidence.)

The Court: As I recall, a copy of Plaintiffs' Exhibit 33, which is now in evidence, was presented to the court previously.

(585) Mr. Pachoda: Yes, your Honor.

The Court: Is this the same document?

Mr. Pachoda : Yes.

The Court: It was annexed to the initial order to show cause?

Mr. Pachoda: That is correct, your Honor.

The Court: I thought it looked familiar and I want to be sure that there weren't perhaps two Wallkill stories.

By Mr. Pachoda:

Q. I take it that one of the main or primary aims of Wallkill is to prepare a man for the day he will leave the prison? A. I hope so.

Q. And that many of the innovative programs are geared to give him the skills and techniques he needs to remain on the outside? A. Right.

Q. And it is true, is it not, that one of the great problems for prison administrators is the recidivism rate? A. Yes.

Q. I assume you feel the special programs by Wallkill are important in reducing that rate? (586) A. Yes.

Q. I assume you feel the special programs by Wallkill are important in reducing that rate?

Mr. Hoffman: I object to that question, your Honor. I don't see the relevance of that to the issues in this case.

The Court: I will let the witness answer the question. He is in my judgment an expert in this area and I see no harm in permitting him to answer. I am hopeful that we won't get too far afield.

A. That is the object of the program.

Q. As you stated before, the full scope of these programs is not available at the maximum security institutions, is it? A. There are programs available, perhaps not as intensive or extensive as ours but there are programs in every institution that I have ever worked in.

Q. I have a few questions about the Liaison Committee. When was this started at the Wallkill Facility? A. About a year ago. I don't know the exact date, but it was approximately a year ago.

Q. This is a body of inmates, I take it, that are elected? (587) A. Yes.

Q. And they meet with you from time to time? A. At least once a month, or more often if it is deemed necessary.

Q. And you consider them, I take it, a conduit between yourself and other inmates? A. Yes.

Q. And they will speak for you to other inmates, is that right? A. Well, they can relay information that I would

like to have relayed to the other inmates, but I wouldn't say they speak for me.

Q. And they will relay information from the population to yourself? A. That's correct.

Q. They cannot deal with specific grievances of a specific inmate, can they? A. No. But they sometimes bring them to my attention.

Q. But they are not supposed to deal with specific grievances? A. Right.

Q. Is that correct? A. Right.

(588) Q. And they have no rule-making power, do they? A. No.

Q. They can relay suggestions as to what should occur, but the implementation is up to you entirely? A. We discuss it. We discuss the pros and cons of introducing a new program or making changes in the existing program. So I would say they assist in making policy, even though they don't make it.

Q. But the final decision-making is up to you to veto or to implement? A. That's correct.

Q. And the Liaison Committee has no power to write any regulations that are enforced throughout the institutions? A. That is true, but they may assist in formulating new ones or removing old ones.

Q. It is also true that any member of the Liaison Committee may be removed at your will? A. It is possible, but it has never happened.

Q. But it is possible? A. It is possible—

Mr. Pachoda: I would like this marked for identification, please.

(Plaintiffs' Exhibit 34 was marked for iden- (589) tification.)

Q. I show you Plaintiffs' Exhibit 34 for identification and ask you if you recognize that document. A. That is the

original constitution of the Liaison Committee, but I don't believe it is the one in existence at the present time.

The Court: Is that constitution, Mr. Butler, the one you hold in your hand—was it in force in May and June of 1972?

The Witness: Yes.

Mr. Pachoda: I would introduce this into evidence at this time.

(Pause.)

A. It would be difficult for me to say it is identical without comparing it with the exact constitution.

Mr. Hoffman: Your Honor, I object to the introduction of this document on the grounds that we don't have the authors of the document here.

The Court: May I see the document?

Mr. Pachoda: Yes, sir (handing).

(Pause.)

The Court: Mr. Hoffman, do you have any other objection to the introduction of this document, specifically as to its authenticity?

(590) Mr. Hoffman: I am not so much concerned about authenticity, but there is no testimony that Superintendent Butler was responsible for the preparation of this document. This document, it seems to me, was prepared by people outside of the court and perhaps outside of this lawsuit.

The Court: Perhaps you would like to have a brief voir dire on the subject.

Voir Dire Examination by Mr. Hoffman:

Q. Superintendent Butler, were you active in the preparation of this document? A. I assigned an officer or a supervisor to assist the inmates on the Liaison Committee in preparing a constitution and a set of bylaws and it took a long period of time and there were a great many differences of opinion, and the final document that was submitted and rejected by the Albany office as being too liberal, and they sent one of the attorneys to the institution to assist the Liaison Committee in preparing a proper document.

I don't know at which stage of the game this constitution was introduced because there were a number of them that were submitted, each one slightly different than the others. We operated without a constitution until just recently, when a lawyer was sent there from the (591) Albany office to assist the Liaison Committee in coming up with an acceptable document. This generally refers to the conduct of the Liaison Committee of June 2nd.

The Court: I gather from your answer to the questions that have been asked by Mr. Hoffman that you yourself are not certain that this document which has been marked Plaintiffs' Exhibit 34 for identification was the actual constitution which was made effective and which was in effect in May and June of 1972.

The Witness: It could be and it is not necessarily. There may have been another one.

The Court: Do you have any document or documents with you today with which you could compare this document to ascertain whether it does represent the constitution which was in effect in May and June of 1972?

The Witness: No, I don't, your Honor.

Mr. Pachoda: Your Honor, in light of the answers I would withdraw the offer in evidence.

The Witness: I could provide you with one, if you want it.

The Court: So that is withdrawn. That is objected to and withdrawn.

(592) By Mr. Pachoda:

Q. It is true, is it not, that you still retain the power to remove any member of the Inmate Liaison Committee? A. Yes.

Q. And that power you had on June 2, 1972? A. Yes. But I would like to again say it has never occurred.

Q. You stated that it was only recently that the Liaison Committee obtained a constitution that was in force? A. We submitted the original constitution, or the final constitution that was drafted, and it seemed to be acceptable to me, to the Albany office, and they disapproved of it. They decided to send legal representation down to assist in making up a legal document, which they did in the past two weeks.

Q. Is there a procedure for ratifying the constitution? A. No. It will be approved by the commissioner, without doubt, and returned to us.

Q. Does it have to be ratified by inmates at the institution? A. No.

(593) Q. You stated that for a period of years you acted as a trouble-shooter for the Department of Corrections? A. Yes.

Q. What years were they? A. The fall of 1965 until the spring of 1971.

Q. During that period of some six years you had to go to a number of institutions to quell possible disturbances or actual disturbances? A. Yes.

Q. Do you know the names of those institutions? A. I could tell you some of them: Dannemora State Hospital, Elmira Reformatory, Bedford Correctional Facility, Napanoch, Northeastern Correctional Facility, the Auburn Correctional Facility.

Those are generally—

Q. You did not go to Wallkill? A. No.

Q. You did not have to go to Wallkill for that? A. No.

Q. You have been at Wallkill for the past year and a half? A. As superintendent.

Q. And during that time you have not had to deal with a disturbance, riot or strike of any nature, have (594) you? A. When I was assigned to Elmira I thought the situation was so tense at Wallkill on two occasions that I came back to the institution because I thought that trouble was going to erupt.

Q. At that point did the inmates engage in any concerted strike or sitdown action or — A. No. There had been a great many reports emanating from the institution that there would be trouble there, that it was imminent.

Q. But in the past eight years, to your knowledge, Wallkill has been relatively free— A. Right.

Q. And has escaped the rebellions and uprisings that have taken place at practically every other institution in New York State? A. We have had escapes there.

Q. I am talking about inmate activities within the institution. A. No, we have not had any.

Q. None? A. No.

Mr. Pachoda: No further questions.

The Court: Mrs. Walker, do you have any (595) questions you want to put to Superintendent Butler?

Mrs. Walker: No, your Honor, I do not.

The Court: Mr. Hoffman, you are recognized for redirect.

Redirect Examination by Mr. Hoffman:

Q. You were questioned about your attitude toward an inmate labor union. Would you tell the court what problems you believe you would encounter at Wallkill if an in-

mate labor union were recognized? A. I think a union of inmates of any kind would be very difficult to deal with.

Secondly, I think that the basic tool of labor unions to achieve their demands is the strike process, and I can't imagine a strike in a correctional institution. I can't imagine how we could possibly cope with it or what penalties could be involved for those who did strike, since these men are already in institutions and have very little freedom to lose by violating the law again. I feel it would be a chaotic situation.

We now have employee unions that are not supposed to strike but they strike and we are troubled by just running the facilities.

(596) Q. Can you tell the court any specific accomplishments that the Inmate Liaison Committee was responsible for in and around the period we are discussing in this lawsuit? A. I think they have—

> Mr. Pachoda: I would object on the grounds of relevance, your Honor.
>
> The Court: I permitted substantial latitude on cross examination and I think that a couple of areas were explored, some in depth and some briefly, and I would be inclined to permit this inquiry on redirect examination.
>
> We are also, of course, sitting nonjury and I am prepared to listen to this question anyway.

A. I think that they have obtained a great many benefits for the inmate population. I can name some of them.

We have never permitted pepper on the tables in any inmate institution or correctional institution during all my years, and we now have pepper on the tables. We have all the milk—milk is now permitted; they are permitted to drink all they want. It is placed in pitchers on the tables.

Each inmate is permitted to purchase his (597) own personal radio and listen to any station that he wishes, unmonitored. We have made changes in the menus. We have made changes in the recreational program, which they had requested and we felt were very, very good. We made changes in the cell lighting.

We have made changes in the dress of the inmates themselves. We have just recently changed the procedure that disturbed them very much about checking their visitors in in the front parking lots. They felt this delayed their visits and we abolished this. We didn't think it was necessary either.

They have obtained a great many benefits and we have benefited from the changes. I think that the relationship has been an excellent one. By the same token, they have carried back to the inmate population some of the things that I feel, such as cleanliness, keeping their areas in better order—I think that we all have benefited from the relationship with this committee and I have not always agreed with them.

Q. Will you tell the court why you chose to transfer the persons you did transfer and not transfer the members of the Liaison Committee? A. Well, in order to be elected to the Liaison Committee you must be respected generally by the inmate (598) population and this is something I think that these inmates have learned, the respect of their fellow men, and they were elected to the position, I respect that position. And they amongst themselves selected their own chairman, without any interference from us, and I felt that Barnes as their chairman should be permitted to act as one.

Q. When you directed Officer Connolly to make an investigation, did you specifically direct him to name the canvassers of the petition? A. No, I did not. I told him not to interfere with the petition, to just let it go. As

long as no trouble was erupting, forget it, this was no problem.

Q. When you asked Officer O'Mara to undertake an investigation did you give him any specific direction as far as which information you needed? A. No, I did not.

Q. How many officers are normally assigned to the key room during the evening shift? A. One or possibly two. It depends on the amount of people that we have available on a given evening. This is also our package room and our key room, and during the early evening there may be an officer who is giving out packages. There is also an officer directly across the hall from the key room at the commissary. He (599) usually stands outside and maintains some control over those men who are purchasing.

Q. Would it be unusual if three officers were assigned to the key room on a given evening? A. Yes, that would be unusual.

Q. When you were confronted with a problem in the institution—when you are, do you personally undertake to investigate that problem? A. No, I don't. I generally delegate this responsibility to one of my subordinates.

Q. Who are the subordinates? A. I have two new ones. Generally it would have been the deputy superintendent. If it related to custody or anything similar, it would be the deputy superintendent, the assistant deputy superintendent, the captain or some of the lieutenants.

Q. Did there come occasions when you asked either Mr. O'Mara or Mr. Otis to make investigations for you? A. Yes, I did, on Monday, the 5th, I believe, and to Mr. Otis when he returned from his vacation on Wednesday.

Q. Was this a usual procedure on your part? A. This is the usual manner of operation.

Q. Can you estimate for the court the number of (600) instances where you asked either of these two subordinates to make investigations and report back to you? A. Almost

daily, some of minor importance, some of—of course, they wouldn't be of major importance daily but hardly a day goes by I don't ask them to investigate something.

Q. How long did you work with Mr. O'Mara at Wallkill? A. Off and on, I would say about 10 or 12 years.

Q. Would you express an opinion on his ability in regard to conducting investigations?

Mr. Pachoda: I object at this point to having this witness express an opinion as to Mr. O'Mara's ability to conduct investigations.

The Court: I will sustain the objection.

Q. What did you observe in regard to the competence of Mr. O'Mara's investigations he made for you? A. I think he is a very competent supervisor. He has been offered the superintendency at three or four of our correctional facilities in the last year and has turned them down because he likes Wallkill and likes the institution. He has been No. 1 on the superintendent's list for a long time and refuses to take the position. I think he is extremely competent.

(601) Q. As the result of any incidents that occurred at the movies at Wallkill, have any inmates requested to speak over the loudspeaker? A. Would you repeat that?

Q. You were asked on cross examination about incidents that occurred during the showing of films at Wallkill. A. Yes.

Q. My question is whether, as a result of any of those incidents, an inmate requested to address the general population over the loudspeaker? A. No.

Q. On June 2nd, when you first learned of the circulation of these petitions, was there any talk between you or your subordinates about transferring any inmates? A. No, sir.

Q. Was there any talk about transferring inmates on June 3rd? A. No, sir.

Harold N. Butler—Defendant—Redirect.

Q. Was there any talk about transferring inmates on June 4th?. A. No, sir.

Q. Have there been other occasions at Wallkill (602) where inmates who were involved with Martin Sostre were transferred from the institution whereas Martin Sostre was not transferred? A. Prior to my transfer there or appointment at Wallkill there were a number of occasions—

Mr. Pachoda: Your Honor, I would object.

The Court: Even though it is redirect examination, unless the question would relate in some way to Mr. Newkirk or Mr. Lucas I would sustain an objection.

By Mr. Hoffman:

Q. Mr. Butler, do you have any personal animosity toward these plaintiffs? A. No, I don't, none.

Q. Would you tell the court what your attitude is toward these plaintiffs? A. I believe that they were very good inmates at Wallkill, that they never created any problems, as far as I was concerned, and I respected them, and certainly never would have been involved in a recommendation for transfer had not this situation developed.

Q. During the week leading up to the transfer of the plaintiffs what was your primary concern at the institution? (603) A. I was concerned with the safety and security of all the people there, including those I transferred, the employees and the individuals. A riot is a terribly dangerous thing and I didn't want anything like that to occur.

Q. What was your primary concern in relation to the activities on behalf of an inmate labor union? A. Although I disagree with the labor union, if it is decided by the court that this is proper, I will live with it and get along with it. It is just my personal opinion, that's all.

Q. During the week preceding the transfer of the plaintiffs what was your primary concern with regard to the activities on behalf of the inmate labor union? A. I was only concerned with the safety and security of the institution. This was my prime concern.

Harold N. Butler—Defendant—Recross.

Mr. Hoffman: No further questions.

Recross examination by Mr. Pachoda:

Q. Mr. Hoffman asked you about the Inmate Liaison Committee. It is true that you had no information that Mr. Lucas or Mr. Newkirk in any way wanted to destroy or undermine the Inmate Liaison Committee, isn't that right? (604) A. That's true. I don't have any personal information that they wanted to do that.

Q. And you are aware, are you not, that at Green Haven Correctional Facility there is an Inmate Liaison Committee that is operating with the union? A. I don't know how they operate there. I am not acquainted with the Liaison Committee there.

Q. You were not told of any conversations or any incidents in which Mr. Newkirk or Mr. Lucas stated they were against the Inmate Liaison Committee in any way? A. Would you repeat that.

Q. At any time from June 2nd through June 8th did you receive any information referring specifically to Mr. Lucas or Mr. Newkirk that indicated that either of them was against the Inmate Liaison Committee? A. All I had was the report from my subordinates. They may have, I did not.

Q. Did your subordinates indicate to you that Mr. Lucas or Mr. Newkirk were in any way opposed to the Inmate Liaison Committee? A. Not specifically, no, they did not.

Q. You mentioned the key room and that in the evenings there are generally one or two officers assigned (605) there, is that right? A. There may be two. I said during the

early evening, when the package room is opened, there may be two officers there. Generally there is one man in the key room who issues the keys.

Q. It is also true that in the evening there are a number of correction officials, such as Mr. Connolly and Mr. Alexander, that are not assigned to one spot and move around the institution? A. That is correct.

Q. And it is not unusual for them to be in the key room at one point in the evening? A. No, not unusual.

Q. You stated that you feel that Mr. Lucas and Mr. Newkirk were very good inmates while at Wallkill? A. I would say they were good inmates, yes.

Q. They were selected to come to Wallkill because of their good records, I take it? A. That's correct.

Q. And you knew that they did not want to be transferred from Wallkill? A. I would presume that.

Q. In spite of that, in spite of the lack of specific information, you at no point during the week of (606) June 2nd through June 8th felt it would be important for your own information or important for the attitudes of these men to speak to them about what had occurred? A. If I were to speak to them that would be some indication that I was considering transferring them or considering some other action. My concern was—and I felt that this was going to die, that it was going to die a natural death, there was not going to be a continuation of this controvery, and I felt it would resolve itself.

Q. You spoke to a number of inmates, including Mr. Coy Smith, about their activities with the inmate labor union, did you not? A. I spoke to him later. I merely asked him his opinion. I said, "I understand you have been interested and would you explain to me why?"

Q. And did you not feel you would do that, engage in that type of conduct with these two inmates prior to transfer? A. I felt they might feel I was attempting to discourage the organization of a labor union, which I was not attempting to do.

Q. You didn't feel you could explain that to them? A. I felt they would take—I felt they might feel (607) it was an attempt to discourage a labor organization on my part.

Q. You felt if you called some people involved in the union it might appear you were attempting to discourage it? A. Yes.

Q. Do you not feel when you transfer people involved in the union that that would be the most striking notice to inmates at Wallkill you were trying to discourage the union? A. I didn't transfer them for attempting to form a labor union; I transferred them because they were creating trouble long after the petition had been signed. Long after it had been circulated this continued to run, and this is why I felt that something had to be done before we had a very serious problem, and sometimes some of your finest inmates became the most assaultive and disruptive during a time of stress.

Q. You did not have any indication that these two plaintiffs were becoming assaultive or— A. I was assaulted by an inmate who liked me and was my friend and put me in the hospital for two months.

Q. You had no indication that these plaintiffs were being assaultive? (608) A. No.

Q. When you say continuing trouble, that had to do with their strong advocacy for the union? A. Yes, this is perhaps what prompted it.

Mr. Pachoda: No further questions.

Redirect Examination by Mr. Hoffman:

Q. Were you concerned only with their advocacy of the union? A. No. I was not concerned with their advocacy of the union, but what it was doing to the facility.

Harold N. Butler—Defendant—Redirect.

Mr. Hoffman: No further questions.

Mr. Pachoda: No further questions.

The Court: The court has one or two questions, if I may ask them.

By the Court:

Q. It was brought out during your examination that after he left Wallkill Mr. Rodriguez wrote a long letter back which came to your attention. A. Right.

Q. Did you receive any communications from either Mr. Newkirk or Mr. Lucas after they left Wallkill? A. No, sir.

The Court: The court has no further questions of Mr. Butler.

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Excerpts From Admissions of Petitioner Harold N. Butler, Read into the Record at Trial

[Trial Minutes, pp. 30-33].

(30) That inmates are very carefully screened before placement at Wallkill.

That only inmates who are believed by Superintendent Butler and his agents to be amenable to the Wallkill program are placed there.

That ordinarily once placed at Wallkill, an inmate serves the duration of his sentence there.

That transfers of inmates from Wallkill are fairly infrequent occurrences.

That there are rooms or cells at Wallkill which may be locked.

That plaintiffs were transferred because of their alleged role in organizing inmates to sign a petition to form an inmates union.

That plaintiffs were transferred from Wallkill because by allegedly circulating the union petitions the superintendent and his agents believed that they would cause trouble.

That dangerous inmates may be locked up in available cells or rooms at Wallkill in the event of a disturbance there.

That Wallkill is the state's only medium security facility.

(31) That at a medium security facility inmates are given a greater measure of unsupervised freedom than inmates at maximum security facilities.

That Wallkill has many special programs which other maximum security facilities in the state do not.

That more inmates apply for placement at Wallkill than can be accommodated there.

That inmates once placed at Wallkill generally do not want to be transferred.

Excerpts From Admissions of Petitioner Harold N. Butler, Read into the Record at Trial.

That the cells or rooms at Wallkill are usually not locked.

That comparatively Wallkill has a smaller percentage of black inmates than other correctional facilities in the New York State system.

That all transfers from Wallkill to other correctional facilities must be approved by Commissioner Oswald or his agents.

That as Superintendent of Wallkill, Superintendent Butler has responsibility, subject to the approval of Commissioner Oswald for setting Wallkill disciplinary policies.

That inmates at Wallkill are told by Superintendent Butler and his agents that violating institutional rules may lead to their transfer.

(32) That Sergeant Alexander and Lieutenant Connolly did not report having observed plaintiffs trying to disrupt a meeting of the inmate Liaison Committee.

That there were no fights among inmates observed by Superintendent Butler or his agents on June 3rd over the union petition.

That there were no fights among inmates observed by Superintendent Butler or his agents on June 4th over the union petition.

That there were no fights among inmates observed by Superintendent Butler or his agents on June 5th over the union petition.

That there were no fights among inmates observed by Superintendent Butler or his agents on June 6, 1972 over the union petition.

That there were no fights among inmates observed by Superintendent Butler or his agents on June 7, 1972 over the union petition.

That there were no fights among inmates observed by Superintendent Butler or his agents on June 8, 1972 over the union petition.

Excerpts From Admissions of Petitioner Harold N. Butler, Read into the Record at Trial.

That Superintendent Butler or his agents did not discuss with plaintiffs why they opposed the inmate union idea.

(33) That as a general rule inmates of Wallkill are permitted to discuss various ideas amongst themselves.

That there was no unwritten rule prior to June 2, 1972 prohibiting inmates from discussing formation of an inmates union of which plaintiffs had knowledge.

That plaintiffs were not seen or heard by Superintendent Butler or his agents advocating any violent action to obtain recognition of the union.

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Admissions of Former Commissioner of Correctional Services Russell G. Oswald, Read into the Record at Trial

[Trial Minutes, pp. 359-362].

(359) Mrs. Walker: Commissioner Russell G. Oswald, defendant in this case, has admitted the following statements are true:

That as Commissioner of Corrections Defendant Oswald had the power and duty to supervise the correctional facilities in the New York State System; that as Commissioner of Corrections Defendant Oswald with his agents formulate the general disciplinary policies to be followed in correctional facilities in the New York State System; that Commissioner Oswald has denied recognition to the Green Haven inmates union; that Commissioner Oswald opposes the formation of inmate unions in New York State Correctional facilities; that Commissioner Oswald and/or his agents were consulted by Superintendent Butler, and/or his agents as to what should be done with the Wallkill inmates who were believed to be signatories or circulators of the union petition on June 2, 1972; that Commissioner Oswald and/or his agents approved (360) Superintendent Butler's and/or the plan of Superintendent Butler's agents to transfer plaintiffs to other facilities; that Commissioner Oswald and/or his agents did not require the superintendents of the institutions to which plaintiffs were transferred to give plaintiffs any hearing as to the reasons for their transfer; that Commissioner Oswald and/or his agents did not require the superintendent of Wallkill to afford plaintiffs any type of hearing prior to the transfer; that the circulation of the petitions by inmates at correctional facilities is not prohibited; that there is no written rule given to inmates prohibiting circulation of petitions for redress of grievances; that the inmates of Green Haven were permitted to circulate union petitions without being punished;

that there were no violent incidents at Green Haven arising out of the circulation of union petitions there; that Wallkill is the State's only medium security facility; that security measures are much less restrictive at Wallkill than at Clinton, Green Haven or Auburn; that inmates at Wallkill are much less highly supervised than inmates at Clinton, Green Haven or Auburn; that Wallkill offers a number of special training programs which are not available at Clinton, Green Haven or Auburn; that Wallkill is much smaller than Clinton, Green Haven or Auburn; that transfers from Wallkill to other correctional facilities are (361) relatively infrequent; that before an inmate in New York State correctional facility may be deprived of good time, he is entitled to a hearing under the regulations promulgated by the Department of Corrections; that before an inmate in a New York State correctional facility may be kept in segregation he is entitled to a hearing under the regulations promulgated by the Department of Corrections; that the fact that plaintiffs had been transferred from Wallkill to other correctional facilities indicated in the records presented by prison officials to the Parole Board; that the superintendent of Wallkill did not tell Commissioner Oswald and/or his agents that plaintiffs' lives were endangered at Wallkill; that Superintendent Butler never told Commissioner Oswald and/or his agents that any special security measures were being made to protect plaintiffs as a result of threats made against them prior to their transfer; that Commissioner Oswald and/or his agents had never received any prior reports of misconduct from Superintendent Butler and/or his agents regarding plaintiffs while at Wallkill; that Commissioner Oswald and/or his agents did not direct the superintendent of Auburn correctional facility to give Plaintiffs Oliver and Rodriguez

Admissions of Former Commissioner of Correctional Services Russell G. Oswald, Read into the Record at Trial.

hearings before holding them in segregation at Auburn for over two weeks; that the percentage of black inmates at Wallkill is less than that at other correctional (362) facilities in the New York State System; that many more inmates seek placement at Wallkill than Wallkill has places available.

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Excerpt From Testimony of Witness Coy Smith at Trial
[Trial Minutes, pp. 192-94].

(192) Q. You said that after the incident at the key room you went to Martin Sostre's room and spoke to him at a (193) second time? A. No, I didn't speak. I just went by. He was talking and I didn't stop.

Q. Whom was he talking to? A. I remember one of the guys. There was two or three guys in his room at the time and the only one I remember, I think, was Rexford Charles, because that is who I was looking for and I spoke to him and he said "I'll talk to you later" and I kept walking.

Q. Subsequent to June 2nd, did you see any other inmates talking to Martin Sostre about the inmate activity? A. No. From the time I signed the constitution I had no conversation with him. I don't think I have had any with him since.

Q. Did you see anyone else or overhear Mr. Sostre discussing the union activity with anyone else after June 2nd? A. No.

Q. You testified before that some of the inmates were concerned about having signed the petition. A. Yes.

Q. What was this concern that they had? A. Well, the ones I remember specifically was a guy named Dennis, I forgot his last name, on the C. Gallery, who (194) was supposed to go home in a very short period of time, and he was saying he was going to go over and try to get his name off it because he didn't want to get boated out to another institution and a couple of the other guys was wondering about reprisals, because there was still an argument whether it was a petition or an application.

Q. Amongst those inmates who you observed were concerned about having signed the petition, did they express any anger or resentment toward the people who had given them the petition to sign? A. No. In a couple of cases

Excerpt From Testimony of Witness Coy Smith at Trial.

some were confused as to really what was going on. I think some might have signed not even knowing what they signed and some did know what they signed.

Q. Did you observe any inmates during the period after June 2nd who were angry or resentful about having signed this petition? A. I observed some who said they regretted it because they were afraid there would be some reprisals.

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Excerpt From Testimony of Witness Eugene Eisner at Trial

[Trial Minutes, pp. 339-344].

(339) Q. I show you Plaintiffs' Exhibit 20. Have you seen that before? A. Yes.

Q. Can you describe what that is? A. This is the form retainer which I had suggested that the Prisoners' Rights Project obtain from the inmates at Wallkill in which the prisoners' labor union at Wallkill retains the Prisoners' Rights Project as its counsel in regard to union matters, and contains the signatures, as I recall, of persons who had in fact signed the constitution formally embodying the union at Wallkill.

Mr. Pachoda: I would like to introduce this into evidence at this time.

(Pause.)

Mr. Hoffman: No objection.

(Plaintiffs' Exhibit 20 for identification was received in evidence.)

The Court: I have difficulty, as I look at the retainer, reading two of the signatures. Perhaps for the record you could assist me. They are the fifth and the seventh names on the retainer.

Mr. Pachoda: I believe I do know who they are.

The Court: Would you state it for the record?

Mr. Pachoda: The fifth name, Eladio Arzuaga, Jr., (340) and the seventh is Eduardo Rosado. I will read the rest of the names:

Mr. Darron T. P. Martin; Allen S. Weinfeld, Charles Kenny, Martin Sostre, Carl Oliver, and Michael Williams.

The Court: And the date of the retainer is June 1?

Excerpts From Testimony of Witness Eugene Eisner at Trial.

Mr. Pachoda: Yes, your Honor, June 1, 1972.

Q. I show you Plaintiffs' Exhibit 4, already admitted into evidence, and ask you if you recognize that? A. Yes. This is the authorization form which I dictated to be used for the purpose of obtaining the requisite number of signatures of inmates to authorize the prisoners' labor union to act for it in all matters pertaining to collective bargaining, wages, hours and working conditions.

Q. You were the author of that language? A. Yes. This is the same language as the Green Haven form and only the name of the facility has been changed.

Q. Where does that language derive from? A. This language is derived from authorization cards which I have also authored for some of the other unions that I am counsel to or have been counsel to. This is the language which is presently accepted by the National Labor Relations Board, the State Labor Relations Board, the Public (341) Employment Relations Board, as the language which is proper for an authorization for a union to act as a collective bargaining agent.

Mr. Pachoda: Please mark this.

(Plaintiffs' Exhibit 21 was marked for identification.)

Q. I show you Exhibit 21 for identification and ask you if you have seen this before? A. Yes. I received a copy of this letter, which was sent by you, on June 9, 1972, to Commissioner Oswald and Superintendent Butler requesting recognition of the labor union at Wallkill.

The language contained in here is virtually identical to the language which we had used in the Green Haven matter.

Excerpts From Testimony of Witness Eugene Eisner at Trial.

Mr. Pachoda: I would like to offer this into evidence.

(Pause.)

Mr. Hoffman: No objection.

(Plaintiffs' Exhibit 21 for identification was received in evidence.)

Q. What steps were taken by the persons involving organizing the Wallkill union prior to the sending of this letter? (342) A. Well, I informed you that before a letter of recognition could be sent you would need a minimum of 50 per cent of the persons incarcerated. You cannot have recognition unless you represent a majority, and at least 50 per cent, 51 per cent of the inmates would have to have signed authorizations, as contrasted to the 30 per cent necessary for the filing of a petition, and I told you when you obtained the 50 per cent of the authorizations, at that point you could make a demand for recognition, using the same language we had used in Green Haven.

Mr. Pachoda: Please mark this for identification.

(Plaintiffs' Exhibit 22 was marked for identification.)

Q. I show you Exhibit 22 for identification and ask if you have seen that? A. Yes. This is Commissioner Oswald's response to your letter demanding recognition, a copy of which was previously received.

Mr. Pachoda: I would like to offer this into evidence.

(Pause.)

Excerpts From Testimony of Witness Eugene Eisner at Trial.

Mr. Hoffman: No objection.

(Plaintiffs' Exhibit 22 for identification was received in evidence.)

(343) Q. What is substance was Mr. Oswald's response to the demand for recognition?

The Court: I wonder, this has occurred before, and the letter is in evidence and I feel it speaks for itself better than any of us could state in substance. Also, the letter is rather brief, and for that reason I would sustain an objection to a question asking the witness to state the substance of the document.

Mr. Pachoda: I would like to read one sentence of the letter, your Honor.

The Court: You may.

Mr. Pachoda: "Please be advised that inmates of correctional facilities serving penal sentence are not employees of the penal institution in which they are incarcerated or of the State of New York. Accordingly, we are unable to bargain with them."

Q. Is that issue, as to whether inmates are employees of the State of New York, presently being litigated? A. That is the issue that is presently sub judice before the Public Employment Relations Board. The Wallkill petition is awaiting the decision in the Green Haven matter.

Q. In effect, the decision as to whether the hearing examiner will recognize or certify the Wallkill institution is also in front of him? (344) A. Yes. Mr. Klein said to me, "In the event we decide affirmatively that for the purpose, at least set forth in the statute, that prisoners are employees within the meaning of the Taylor law"—he said at that

Excerpts From Testimony of Witness Eugene Eisner at Trial.

time he would join the Wallkill matter and Bedford Hills matter with Green Haven, so that we could go ahead with all of them at the same time.

Mr. Pachoda: Please mark this.

(Plaintiffs' Exhibit 23 was marked for identification.)

Q. I show you Exhibit 23 for identification and ask if you have seen this. A. Yes. This is the petition that was prepared by you, under my direction, for the purpose of filing for certification of the Prisoners' Labor Union at Wallkill.

Mr. Pachoda: I would like to offer this into evidence.

(Pause.)

Mr. Hoffman: No objection.

(Plaintiffs' Exhibit 23 for identification was received in evidence.)

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Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial

[Exhibit 1, pp. 12-48, 59-73].

(12) Q. Okay. And during this period right before dinner, they talk to each other and exchange words with each other and games of chess and so on, with each other? A. Yes, there's no—in Wallkill, I think you're possibly thinking about the other institutions, in Wallkill they're free to roam any area and they are not restricted to one area. They can go in the gym. The court is open outside this window. They can go to the music room, go to the library, at that particular time there's a commissary open where they go according to their gallery. Many activities going on. I mean, it's wide open. (13) They have free access to parts of the institution.

Q. From your experience, this is very different than other institutions? A. Definitely.

Q. Now, dinner takes place about 5 to a little before 6. A. That's right.

Q. Is there another count then? A. Usually there's a 6 o'clock count which commences about 6.

Q. And also then inmates return generally to the areas where they live? A. Yes. Outside of your kitchen and your dairy barn crew. Possibly they may go out early. There's possibly 20 or 25 inmates on the outside—off their housing location, housing unit location.

Q. All right. Then, after the 6 p.m. count, what takes place, generally? A. It usually takes between 20 minutes and one-half hour to verify the count through the process of adding and subtracting. Usually by 6:30 the galleries are then again (14) cleared and the inmates are allowed to participate in the particular program they want to participate in.

Q. At this point, it's again free time for the inmates? A. That's right. They go wherever they want within a free range.

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

Q. What type of things might people be doing at this time, just as an example? A. Well, your main activity would be your gymnasium. We have a recreation supervisor that works approximately from 12 to eight at night. We have two now. The gym is open until 8 o'clock, supervising intra-mural—basketball is one of the main activities here. The music room is open to 8 o'clock. The library is open until 8 o'clock and the televisions are on. There's many activities. I can't give you the total gamut that goes on.

Q. At this point, inmates are free to decide or choose— A. No restrictions here on who they can associate with. They are free to roam a (15) range, the total area of the institution outside of your locked areas, which would be your shops are closed and—

Q. Right. And if a group of inmates wanted to sit and talk with each other, they could just sit down and talk? A. Right.

Q. Or write something up or whatever? A. That's right. No restrictions.

Q. And then, is there another count? A. 8 p.m.

Q. There's an 8 p.m. count? A. Right.

Q. Inmates generally have to return to— A. Same process occurs, only there's probably less men on that out count.

Q. Right. A. That takes probably 20 minutes.

Q. Okay. And then after that? A. If the count is okayed, they proceed in the same general area, they can go anywhere. The gym is still open. Usually an officer supervises the gym at that particular point. They may play basketball or volley (16) ball, whatever type of recreation might be scheduled for that particular evening.

Q. Right. A. Now, I'm talking about winter schedule. There's a summer schedule too. Generally, this is what happens.

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

Q. It wouldn't be very different in terms of the mobility and freedom? A. No, the basic freedom is there. The basic freedom is there.

Q. Right. And inmates—let me ask you this, the inmates, what are their housing facilities like? A. We as Correction Officers still use the old terminology "cell." But actually they're rooms.

Q. They're rooms. A. But we still use the terminology "cell."

Q. Right. And there would be how many people in a room? A. New York State in your correctional facilities, I believe the law states one man to a room.

Q. Can you briefly just give me an indication of (17) the difference between the rooms here at Wallkill and the ones in the other institutions, the maximum security institutions. A. In my opinion, or what it looks like?

Q. Looks. A. Bars. There's no bars. There's a door on it.

Q. There's a door you can close? A. Right. And the toilet facilities are on the end of the gallery. You can look right out that door here and get a view, your own visible example of what I mean.

Q. And what might an inmate be allowed to have in his room? There's a bed, I take it. A. All the necessary facilities of a housing unit or housing room. There are certain restrictions, but not that many. There's a locker, clothing rack, lamp, small desk, I think that's what you mean.

Q. Yes. A. Basically, each room is the same in content, regarding the necessities of living in a small area.

Q. But there's room to write— (18) A. Yes.

Q. —and the inmates can type in their rooms? A. Yes, indeed. They are allowed to have typewriters. We don't

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

discourage any typing. Possibly, at night we might, but in parts of the evening, no.

Q. Is that a solid door? It's not a glass door? A. There is a small opening about maybe one by two inches, where the officer during the night shift has to make his count, during your midnight to eight, actually basically between midnight and 7 a.m. in the morning, where he more or less verifies that the man is there, whether he's all right, whether healthwise he's still functioning. It is possible that a man could get sick during the night and the officer is required to make frequent checks of the area.

Q. During these free periods during the evening, can more than one inmate go to a room and sit and talk? A. They usually allow four—five inmates in a room at one particular point. It's rather crowded, but it is five.

(19) Q. But five could go and sit and talk? A. Yes. Any more than five is not feasible.

Q. Not too much room? A. That's right.

Q. There's the eight o'clock count and then is there— A. A ten o'clock count.

Q. Ten o'clock count. A. I am sorry, we've done away with the ten o'clock count within the last two months. We have an 8 and 11 o'clock count.

Q. But would this be the time they return to— A. This is the time, this particular time at 11 p.m. is when they return to the galleries, the televisions are turned off at 11 p.m. The count is made. They're usually in bed or in their room by 11:30 p.m. at night, at which time another count and then the midnight, the relieving Lieutenant or Sergeant on the midnight shift comes in and verifies that that count is okay and I am permitted to leave.

Q. At some point do all the lights have to be out? (20) A. The lights usually go out at 10 minutes after 11 at night.

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

Q. Then all activities go on until 11 o'clock at night? A. Usually, there's a cut-off point, 11 p.m.

Q. Go to the gym and watch t.v. and so forth? A. Yes. Outside of the time the count is on, they are locked, otherwise, they are permitted free access to three-quarters or 85 per cent of the institution.

Q. Okay. Now, to get a little more specifically to June 2nd. I think that at some point after you came on duty, you became aware of inmates passing a petition or an application; is that right? A. Right.

Q. About what time was this? A. Approximately, oh, around 4:30 or 4:15; somewhere around that time.

Q. Do you recall where you were then? A. I was right downstairs where we went in the building.

Q. Did you see the inmates holding the petition? A. My officer saw them.

(21) Q. I see. You don't recall who actually reported to you? A. No, I can't recall who, but as this developed, many officers reported in from the galleries that there were people circulating petitions, and I advised them to keep a close watch out to prevent any—find out what was going on and to prevent any difficulty or anything happening.

Q. This was a fairly unusual occurrence, I take it, the passing of petitions? A. Well, not—you know, Wallkill is not the type of institution where one gets upset about these things. One really has to keep an eye on what is going on, in other words, to prevent any problems from developing.

Q. So, basically, your advice to the officers was just curiosity, find out what was happening? A. Yes. Find out in the process and prevent any problems as a result. You know, what's happening and keep me informed. Let them pass the petition. There's no objection to that.

Q. Did you recall—well, Mr. Alexander, I think. (22)

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

was on duty that night. A. He was with me, yes. He was my second in command.

Q. Right. Was he with you at the time physically when you heard this or was he one of the ones who reported to you— A. No, he was probably in the kitchen. I can't remember where he was.

Q. Now, would there be the same officers, pretty much, on that four-to-12 shift? A. Yes. They keep the same help outside of your regular days off. It's a steady shift for these people, with the union regulations and I use that as a joke. They bid in on these jobs now. It's a bidding process.

Q. Is that a desirable shift? A. For me?

Q. Yes. A. Well, for my benefit, it was. I graduated from college working the four to 12. So it benefited me. I have to be honest, that some people have outside interests, shall we say, and prefer to work the four-to-twelve. Each to his own interest.

(23) Q. Okay. But you don't remember which officers at approximately 4:30 came and reported this to you? A. I would have to get the chart. If I had the chart for that day I could definitely tell you who it was.

Q. Do you have the chart with you? A. No, I don't have it.

Q. Is it here in the institution? A. It's here in the institution. Matter of fact, I can tell you the gallery. The CD-1 Gallery was the one who reported it to me.

Q. CD-1? A. Yes.

Q. Yes? A. He said that they were passing the petition and I said to him, find out what it's all about, et cetera, et cetera and just keep me informed and—

Q. Okay. And then, I assume shortly after, people went to dinner? A. Right after that, they did, right, they went about ten minutes to five as I mentioned (24) before and I

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

started to get various reports on the activity that was going on, the people that were circulating the petition. It gradually progressed until after dinner—naturally, in the mess hall, we didn't have any contact with the petition. We didn't even discuss it.

Q. There wasn't any contact? A. No.

Q. Dinner as usual? A. Normal dinner routine.

Q. Were you in the mess hall yourself? A. Yes, indeed, I always try to be in the mess hall.

Q. Can you be a little more specific about the increasing reports you got? Who they were from? Other officers? A. Most of the gallery officers would have to see what was going on. It was an activity that normally didn't exist prior to—say, prior to yesterday or the day before or whatever. A man's going around with a piece of paper in his hand, a newspaper clipping, as I was told. Officers are trained to observe.

(25) Q. Again, do you know any specific names of people who reported to you, any of the officers? A. There again I'd have to go through the chart. I didn't know you were going to go into these details. But I can get the chart and tell you.

Q. Maybe we should do that.

After dinner, did you return back to the control room? A. Yes, we took the count, came upstairs and went around the telephones, the administration buildings, where you came in.

Q. The six o'clock count, as you recall, went as usual? A. Right. It really went smoothly. There was no problems. There was no problems at all at that particular time.

Q. Then you returned to the control room? A. Yes, I made a—I think I might have walked around. I can't remember, you know, my exact movements. I probably made a round, tour of the institution. I was in the general area.

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

I try to stay close to the phone which (26) is most important.

Q. The phone is in the control room? A. Well there's phones throughout the whole area. There's a switchboard. Right down below this floor here is a telephone switchboard. In that area, pretty close to the phone.

Q. For the record, we're on the second floor. A. In the hospital, second floor.

Q. By the floor below, you mean the main floor? A. This is all the administration building. The first floor is where you entered the building and there are the telephones.

Q. And the basement is one floor below? A. One floor below. Directly below your telephone switchboard is your control area, whatever you want to call it.

Q. I see.

We have been given the Duty Chart which we'll mark as Plaintiff's Exhibit 1 for identification.

Q. Okay, then, returning to the night of June 2nd, after the 6:30 count, you recall as specifically as possible, what other reports you received and what the nature of (27) those were. A. No, but around 6:30, after the 6:30 count, I recall passing an inmate that belonged to the liaison and I said to him, casually, in passing, I said, Are you aware of a petition being circulated through the population regarding—I found out eventually between 4 and 5:30, that this was a union petition, because I had been acquainted with the petition that was circulated in Greenhaven through the newspapers. So I casually mentioned it to him more in a joking way and he seemed flabbergasted that such a petition existed and exhibited behavior of disbelief. And I laughed and went on.

Q. Do you recall who this was? A. I think his name was—do I have to give his name? Okay.

Q. You talked about at some point you passed an in-

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

mate and you asked him if he was aware of the petition about the union being passed? A. Yes.

Q. And he was surprised at that? (28) A. He was flabbergasted. He expressed disbelief that it was going on and I more or less said, It's true. I'm not joking. And I proceeded on.

Q. And you are aware of this inmate's name? A. Yes, I am.

Q. Would you tell us that person's name? A. No, I won't, unless I'm ordered to do so by a Judge.

> Mr. Pochoda: The plaintiffs object to this and feel that this will make the rest of the deposition somewhat meaningless and will continue to—attorneys for the Defendants refuse to let the witness answer the question and we have advised them that we will continue the deposition in Foley Square; that we will go on today, but we will have to continue the deposition for these parts in Foley Square in front of a Judge.

Q. You mentioned that, earlier you found out that the petition was involved with a union.

(29) Do you recall about when you found that out? A. I probably found that out about, oh, just before I went to the mess hall. It was mentioned to me that the officer had observed a newspaper clipping with the circulation of the petition and he, being observant, it mentioned Badillo and through association, and the petition, I assumed that it was the labor union attempting to organize.

Q. You were familiar with this because it had happened at Greenhaven? A. I live in Dutchess County and only live about 20 miles from Greenhaven and I am aware of the union activities and I read it in the Times and the local

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

papers regarding the union.

Q. Had you seen the actual paper that was being passed around at this point? A. No, I didn't.

Q. What time of the evening, did you actually see the paper that was passed around? A. I never did see the paper.

Q. You never actually yourself saw it? A. No, I didn't.

(30) Q. All right, when did you speak to this member of the Liaison Committee? About 7 or so? A. I'd say around —between 6:30 and 7 o'clock; somewhere in that area. No later.

Q. Had there been any discussion to your knowledge, about the union, at Wallkill, prior to this? A. No, I never heard it mentioned.

Q. And you never heard it mentioned by the Administration, either, I take it? A. No, it was never discussed. I think everybody was—I thought everybody was happy. Apparently, they weren't. As happy as you can be in an institution.

Q. Now, what happened after this? Where did you go after this? A. I decided to, being that this thing was brought up, it started to develop into more than my responsibility warranted, and naturally, it's the duty of the Supervisor to keep the top Administration informed and I contacted Mr. Butler, the Superintendent. I apprised him of the situation and I told him that I had mentioned it to one of the Liaison Committee Members and he expressed (31) surprise. I filled him in on most of the details.

Q. About what time would this be? A. Probably around 7 o'clock; somewhere around there. I can't remember.

Q. Somewhere around 7? A. Yes, right.

Q. You called this man on the phone? A. Yes, I did.

Q. Where would be Mr. Butler be found? A. At home.

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

At his residence. He lives up right at the end of the street here.

Q. Street here? A. I said street. It's row. As you came in the institution, that house on your right as you came down, the first—after you came up there, that's his residence. The State supplies his residence by State Law.

Q. And you then indicated that you heard all these reports about— A. And things were developing and I told him, and he said, just keep on top of it. I mentioned to him that the—I'm repeating myself—that the Liaison Committee Member (32) expressed surprise and we went on from there. He hung up and I completed the conversation.

Q. Just to go back for a second. When the Liaison Committee Member left, I take it, did he indicate he was going to try to find out about what this was, what this petition was about? A. I don't remember now. He did express surprise and—

Q. Returning briefly to the time that you met the member of the Liaison Committee, did he indicate to you that he was going to attempt to find out what the nature of the petition was? A. Not verbally, but when you mention something in this vein and no one knows anything about it, you know, an institution is an abnormal environment and rumors are always a rampant source of information. Right away, he must have went back and checked on it, on what I said.

Q. Were you surprised that he didn't know about it, this particular inmate? A. Yes, I was.

Q. Why? (33) A. Because the purpose of the Liaison Committee I would assume, is to—they're elected officials, shall we say of an institutional community in New York State. They're representative of the inmates. I would assume that they would have known this petition was being circulated, because being duly-elected representatives of a

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

group, they would normally indicate by logical deduction that they were aware of it. That's what I assume, I was surprised.

Q. How many members are on the inmate's Liaison Committee? A. Six.

Q. Do you know the names of the six people? If you could just tell me on June 2nd, who were the elected members of the Liaison Committee? A. Barnes.

Q. Warren Barnes? A. Warren Barnes was one. Henry Best.

Q. Henry Best. A. I think Rodney Culpepper—I don't know—don't quote me on the first names. Crabbe.

(34) Q. Crabbe. A. How many is that? Four?

Q. Four. A. Gagnon. And believe it or not, I can't remember the last name.

Q. Well, we can get back to it, if you do. Now, after you spoke to the inmate, you spoke to Mr. Butler, and then what did you do? A. I am trying to recall in what area I was. I was either at the key room which is adjacent to the control room. Or I was upstairs and I was informed by either the officer downstairs that some of the inmates wanted to see me, the Inmate Liaison Committee.

Q. Do you recall this officer that mentioned this to you? A. I believe it would be Mr. Harvey. Now, this is not a—I can't swear to something so accurately. But it was brought to my attention that the Members of the Liaison Committee wanted to see me. I went down, I believe, or had them come upstairs.

Q. Where would they be, the Members of the Liaison Committee? (35) A. Yes, they were at the key room, which is down next to the control room.

Q. Right. A. This is more or less, one of the focal areas of the institution where inmates come to request information or they can pick their packages up or any type—it is

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

more or less, an information center. I brought them upstairs. Let's see. Two of them came. I just can't recall who they were. It was either Best or Barnes and they got the other members and we went upstairs to the Warden's Office which is—Superintendent's Office which is downstairs.

Q. Let me just stop here for a second. Inmates have access to the key room? A. Oh, yes, the key room is a—there's a grill, small opening, probably two-by-three where keys are dispensed to employees through that area. They have free access to come to the—for instance, if a person wants to go to the hospital in an emergency he would have to go to the key room in order to get upstairs. So, I'm trying to describe (36) it. It's more or less of a focal area where an inmate, if he had any problems, different specific problems, he would come to that office, the key room.

Q. They went down there and then the officer came up and talked to you? A. No, he called me on the phone.

Q. Called you on the phone? A. Right. And—

Q. You told him to bring— A. I brought them downstairs.

Q. You went down to the key room yourself? A. No, I had them sent up. It's right up the stairway. There's only a grill gate and they just—the officer in the key room controls it and he opened the grill gate.

Q. Right. A. Prior to that time, they must have convened as a group. And they must have convened and talked the situation over. I didn't ask what went on but they came to me and they requested that I—wanted to talk on the loudspeaker; that was basically the request. And I immediately contacted the (37) Superintendent and I brought them upstairs; it was either upstairs or downstairs. I can't remember which. But the main point that they wanted, was they wanted to make an announcement

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

over the loudspeaker system and I said I would have to check with Mr. Butler. I brought them to the Warden's office, all six of them and I called the Superintendent in their presence and I conveyed their request and as a matter of fact, Barnes requested to talk to the Superintendent on the phone regarding the request of speaking on the communications device and Mr. Butler gave the approval.

Q. Did they state specifically what they wanted to say or did you tell Mr. Butler what they wanted to say? A. Well, Barnes indicated—Barnes, who was more or less the spokesman for the group indicated that he wanted to convey a message. When he spoke to Mr. Butler, I overheard—naturally, I had to overhear it, everyone did.

Q. Right. (38) A. And he wanted to state on the loudspeaker that the Liaison Committee was not involved in the circulation of this Petition.

Q. Were they upset, the Liaison Committee upset at this point? A. Well, they were concerned. I wouldn't say upset to the point where they were raving mad, you know, or extremely agitated. But they seemed concerned. There again, this is an opinion. It appeared to me that they were upset as a duly-elected organized body that they were not consulted in this, the formulation of this petition. There again, I'm assuming. This is just an opinion. That's what it appeared to me.

Q. Right. And they didn't know about it prior to this night? A. Not the way I make it.

Q. I take it, it is unusual for inmates to talk over the P.A. system? A. Yes, I would say that. It's not a usual occurrence.

Q. But why did they feel it necessary to tell people that they were not involved in this? (39) A. There again, do you want an opinion, what I believe or—I can't base this on—I can only base it on what I observe. I would assume

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

they were rather upset about the fact that they weren't consulted with the petition was circulated. Second of all, I would assume that they were upset that their name was being used as a source of circulating this petition. These were again, what I observed.

Q. I see. You stated earlier, that you had, at some point during the evening, begun to find out who was involved, or who was involved to some extent in passing this petition? A. Well, all of these officers on this particular duty chart are all assigned to inmate locations, housing locations.

Q. Right. A. So, therefore, as time went on, you would be getting reports of them passing these petitions around.

Q. Do you recall which inmates were mentioned as passing these petitions around? A. Well, Brother Sosfry, yes, he was one of the ones. I know that. That was documented.

(40) Q. Documented how? A. The officer.

Q. What did the officer say to you. A. He saw him circulating it.

Q. Did he say how he saw him circulating it? A. He was walking around, just passing it among the inmates; that's all.

Q. Do you recall who the officer was who mentioned that? A. No, I don't. I can't recall because it was—there were numerous reports coming in. I didn't categorize—naturally, when something like this happens, we didn't know there was going to be—what's happening now as a result of this. So, therefore—

Q. Well, I understand. If you do have it? A. I don't know. But Sosfry was circulating throughout the whole institution as were the rest of the people circulating as were the rest of the people circulating these petitions.

Q. Do you recall any other names? A. Lucas, Oliver, Newkirk, Kenny.

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

Q. All of these were reports from officers to you? (41) A. That's right.

Q. These men were observed passing the petition? A. This place is wide open. It's not a question of—you know, you would have to observe it. An officer would be derelict in his duty if he didn't see people walking around with a petition with a newspaper clipping and a person of Mr. Sosfry's stature would indicate that there was something going on.

Q. These reports, were they basically in the nature of, These were the people I saw involved? Did they mention anything else? Anything else that was going on. Just I saw Mr. Oliver and Mr. Lucas passing the petition? A. Yes, these names were associated with it and that would be it. There was no arguments and there was no fights. Just passing the petition around.

Q. Were there any other names that you recall? A. No. I—not right now—I could defer that.

Q. Was there any record, a written record kept of (42) this, when you received it? A. I have a record.

Q. You do have a record? A. Yes, I do.

Q. Do you have that on the premises? A. I do.

Q. You mentioned that there were some other reports besides officers, about the passing of the paper; is that right? A. Right. During the time possibly between 6:30 and 7, 7:15, about prior to the Liaison Committee approaching me, an inmate came to me and wanted to talk to me. The inmate came to the key room as mentioned previously—excuse me, he spoke to the officer in the key room, Mr. Harvey, Mr. Harvey contacted me and I asked him to come upstairs. In these cases, it's always best to try and take the inmate away from the population. There is less chance of causing problems. The man came up to me and he expressed concern. He said Wallkill was a good

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

institution. He said that this—these actions that were going on, he thought, were detrimental to the philosophy (43) of Wallkill and principles involved and he mentioned —told the content of what the petitions were. He didn't mention anything about the Liaison Committee not being involved. He did mention, he felt, and this was only his opinion, that this would have been detrimental to the security of the institution.

Q. Did he mention some of the people involved in passing the petition? A. No. I can't recall. He didn't mention any names. He tried to mention the fact that he didn't think this action—he didn't give me any names. I didn't ask him and I didn't want any names. This man has never been an informer to me. I have never had that intimate contact with the man. He came and volunteered this information.

Q. You know his name? A. Yes, I do.

Q. You don't want to give it to us now? A. I will not give it unless I am ordered to do so.

Q. You stated that this information as well as (44) other information concerning reports from officers is recorded in a written document; is that right? A. Yes, my report is documented.

Q. This report that you made out yourself? A. I speak for myself. My report is documented

Q. When did you write this? A. I wrote that—I started the document probably about 11:45 that night and I didn't leave the institution probably until a quarter to one the next day.

Q. And in that you covered the— A. I covered the total events of the evening, as I saw it, to the best of my ability. I covered the events.

Q. Is it usual for you to write a report after your shift at 12 o'clock? A. I have done it before. When you work

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

for the State, you find out that sometimes in extenuating circumstances, you have to stay beyond your tour of duty. But in this particular instance, the situation warranted it, where I didn't have time to write the report before. I couldn't sit down, you know, it takes (45) at least 35 to 40 minutes to write it. I don't type. I write in longhand, so therefore, it was a report of a confidential nature. I don't have a typist and therefore, I wrote it myself and therefore, it takes time. With the tension that was going on in the institution that particular time it behooved me to wait until I had a quiet time to get my thoughts together and write the report.

Q. This report went to who? A. Mr. Butler. Through the chain of command; through a man by the name of Mr. O'Mara who is Assistant Deputy Suprintendent. It was channeled to him and then it went to Mr. Butler, the Superintendent.

Q. Now, getting back to the night of June 2nd earlier, none of the—well, the Inmate Liaison Committee, about what time was it when they requested to go on the air; do you recall? A. I can't give you the exact time, but it probably was around a quarter to eight. Around that time. It was in that area. You know, I can't remember the events as it (46) existed, but it was around 8 o'clock. Either prior to it or after it. I believe it was prior to it.

Q. Then, did the 8 o'clock count take place? A. I would assume if it took place—yes, somewhere around there. It was in that area, you know, around that time. Might have been after. I can't remember exactly. I am sorry about that.

Q. Was there some discussion between yourself and the Liaison Committee about the advisability of going on the air or not going on the air at that point? A. No, I didn't advise them to do anything. They had requested the Superintendent to perform this action, Mr. Barnes, or

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

whatever you want to call him, he seemed to be disposed to it and indicated his desire to go on. And I don't think if I had been able to deter him, the situation developed that he wanted to speak on the loudspeaker. No one forced him. No one advised him. I didn't realize what the ramifications would be after he spoke. I never thought about it. But there (47) was tension and there was some tension as the petition was going around. You know, it's not a usual situation to have a petition circulating, so the officers were wondering, the inmates were wondering. There's to a degree, tension.

Q. But as you said before, you yourself didn't observe the petition being passed around, personally? A. No, my officers did and I—my officers are usually competent individuals. In Wallkill, one has to train himself to be observant. Here, we don't have that much control. Our policy here is not one of control. The burden to observe the rules is on the inmate.

Q. Did any of the officers in their reports to you about passing the petition suggest that it would be a good idea for the Liaison Committee to make a— A. No, they would never have known that the Liasion Committee was involved or sponsored this. I believe, I don't know, but they would never have suggested this.

Q. Did any of their reports suggest that the tension was very high and therefore, the Liaison (48) Committee might go on the air to alleviate it? A. No, no, they didn't mention anything like that. My officers didn't say that. They just kept me informed and that was it.

Q. They didn't mention that the tension was very high? A. Not at that particular time. There was a scurrying of activity going on, you know. It was an unusual situation and whenever there is anything like that, there is tension, I would assume.

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

Q. You mentioned the phone call to Mr. Butler and Mr. Butler agreed to let the Liaison Committee go on the P.A. system? A. After he spoke to Barnes on the phone. And he said is this your wish, etc., I can't remember the exact conversation, but Barnes, with the approval of the rest of the Committee, Barnes wanted to go on the air. They were permitted to do so.

Q. And when did that take place? A. There, again I can't pinpoint it, but say, either before 8 p.m. or after the count . . .

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(59) Q. And at some point, did this group of inmates disperse? A. Yes. I would say, after—from the time it commenced to the time the discussion ended, probably about an hour. I stayed in that area, then, because I didn't want to leave. The Sergeant was there and the officer was there. See, the other two officers that were on this chart, usually open this court. This court out here is open until night and I mentioned, the gymnasium is open from 8 to 10, where an officer covers the recreational area.

Q. Right. What time would this have broken up then? A. I would say—

Q. Approximately. A. —9:30. The discussions around the key room, about 9:30.

Q. And did they return to their areas? A. Wherever they came from. Things quieted down.

Q. Right. A. There was a few inmates—I know one particular inmate came to me and there again, (60) don't know his name and he said to me that he wanted to find out how he could remove his name from the petition. And I said, I haven't the slightest idea. I don't know. If you put your name on the petition, that's your prerogative. I am not going to go find out about the petition.

Q. After the Liaison Committee made the announce-

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

ment? A. He was rather upset about it. I don't know why. I told him, Don't worry about it.

Q. Then, after they broke up where did you—after the crowd broke up, were did you go? A. Oh, I think I made a round, the usual procedure. I believe I did. I can't know exactly what happened, but I made a tour. I made a tour of the institution to see what was going on.

Q. Okay. And then you returned to the control area? A. I returned to the area—yes, control area of the Administration Building.

Q. Right. What happened then? A. That was it. We had the count and there was no problem.

Q. The normal 11 o'clock count? (61) A. Yes, The procedure that I disclosed to you, the normal routine.

Q. And the round you made was a fairly normal round. A. No problems.

Q. No problems. Well, then, you wrote up your report about what happened? A. Yes. Well, I started about 11:30, or so, after the count, because naturally I had to take the count with the Sergeant and there are certain duties to perform to get ready for the supervisory leaving. And I started the report around, say, 11:15 or 11:30, in that area.

Mr. Pochoda: We are marking for identification, Plaintiff's Exhibit 2, the report from A. J. Connolly to Mr. O'Mara, Deputy Superintendent dated June 2, 1972.

(Report from A. J. Connolly to O'Mara, dated June 2, 1972—marked for identification as Plaintiff's Exhibit 2, as of this date.)

Q. Now, in this report, you said certain inmates were the canvassers for the petition? A. Yes.

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

(62) Q. This information was what you obtained from other officers? A. Other officers; right.

Q. You don't have the— A. I don't have the officers that gave me the information, but they were all officers that gave me that information.

Q. Right. A. That, by the way, came about as a result of—that second report—

Q. Well, the second report was a single page dated June 2, 1972, marked for identification as Plaintiff's Exhibit 3.

(Single Page Report dated June 2, 1972—marked for identification as Plaintiff's Exhibit 3, as of this date.)

Q. This came about when? A. That came about—that report was conveyed to me by Mr. Koch, he's the officer assigned to—what's the date on that?

Q. June 2nd. The same date.

Do you believe it's the wrong date? A. No, I have to check this. We were working that night. I possibly made a mistake and (63) placed the wrong date here. I can verify this by the next chart. Possibly, put the wrong date and it should have been June 3rd.

Q. Mr. Koch was not on duty June 2nd? A. No, no, no. This was an error on my part when I wrote this report this was probably June 3rd. I would have to verify the chart on that. I wrote the wrong date on that.

Q. Do you recall when you you got it, did Mr. Koch hand it to you, personally? A. No. He called me on the phone.

Q. Yes. A. And—

Q. The report is in your handwriting? A. Yes. Koch was an officer. I think he was assigned to—and don't quote me—I have to check the chart again. He called me on the phone and advised me that these people were cir-

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

culating the petitions. That would be on June 3rd, too. That would be the following day.

Q. Do you recall if he said anything else that's not in the report about the people circulating the petition? A. Koch, there, again, gave an opinion. The (64) report in essence says, Koch said to me on the phone that Sosfry had encouraged Lucas to circulate the petition.

Q. Right.

But did he talk about the details of what happened when they circulated the petition or whatever? That's not in— A. No, he didn't go into details. He wasn't working that night.

Q. No, even now. Where did he get this information from, who was passing the petition? A. That you'd have to ask. This is, again, hearsay. Mr. Koch called me on the phone, advised me that this was so. I wrote this quickly. It was probably late at night. Ten or 11 o'clock Saturday night. I wrote this down and I sent this to Mr. O'Mara and I sent it in. That's why that is attached to this—it's not part of that report and is in more or less a social way rather than a communicative way.

Q. Right.

Were there any other reports that you made to any of the superiors about the petition? (65) A. No. Just that.

Q. Just that and this one. A. And that was added later, the next day, but definitely—I say Koch was not working that night.

Q. Did you receive from anybody of your superiors, any instructions, report or memoranda, statements whatever, about the passing of the petition, either June 2nd or on subsequent days, later days? A. You would have to clarify what you mean.

Q. Did you receive any instructions how to proceed about the petition or instructions about the union? A. No.

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

Q. Do you know if any were put out by the administration? A. No. After I made that report and after I submitted that second report, my involvement in the matter more or less, ceased.

Q. Right.

Now, this first report is dated June 2nd. A. That I can swear, is accurate and there's no (66) mistake.

Q. I am talking about Plaintiff's Exhibit 2, the one you made from 11:45— A. 11:15 to, say, beyond, I had written notes and I had to set it out in longhand and in my own handwriting. First I wrote it in pencil and then I—

Q. Were you asked, specifically, for a report by anybody? A. In my particular job, it's a necessity to make any reports of any unusual incidents and this was an extremely unusual incident and naturally one has to make reports.

Q. Right. A. I mean, he would be derelict in his duty if he didn't.

Q. You didn't receive a phone call to make the report? A. No. Oh, no. No, no, no. Positively not. I've been in the business too long. I take pride in my job. I never leave an institution unless I feel my work is completed. As a matter of fact, that night I didn't put in for overtime and I'm entitled to overtime.

Q. Right. Any other day, between June 3rd, for the next week or so, receive a specific request for a report about the union or the petition or anything like that? A. No. The events that transpired on June 2nd, 1972, that are in that report, more or less, ends my involvement in the matter.

Q. Do you, yourself, make any recommendations about what should happen with the people involved? A. No, I don't.

Q. Either orally or written? A. Not in that case. No advisements or didn't become involved in it.

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

Q. Either on June 2nd or for the next ten days? A. No, I didn't.

Q. So, after this report, the second report, that pretty much ended it. A. I would have to check that. That's not the date. It would have to be June 3rd.

Q. That pretty much ended your direct involvement in this situation? A. Right, and that was the end.

(68) Q. You were involved in discussions with other administrators about what to do about the situation? A. No. As I related before, on June 2nd, I was more or less, the 4 to 12 supervisor and then on June 3rd, I think I—I can't remember my tour of duty for that following week, but I more or less, worked the 4 to 12 shift, as a—see, there's a Captain in charge and because of my school program, Mr. Butler was very kind enough to leave me on the 4 to 12, so I could complete my education and I more or less, up to four weeks ago, spent most of my time on the 4 to 12. As a relief officer or in charge of the shift; normally a Captain.

Q. After June 2nd. Say, between June 3rd and June 10th, were you involved in any discussions about what should happen to people involved with the union? A. No, no. No, no, no. I wasn't involved.

Q. And you weren't involved or asked your opinion about whether certain people should be transferred from Wallkill? A. No, no, no.

(69) Q. During the entire evening of June 2nd, the number of personnel at the institution remained the same as any other night? A. Right, right.

Q. It wasn't supplemented by new people? A. No. The 14 people that I had mentioned previously.

Q. In terms of the incident, your main concern, as far as a possible problem, was the scene you described in the key room where the 20 to 30 people were? A. We, first of

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

all, don't have the manpower to control any unusual situation, so in that case, any unusual incident, it's always best to keep on top of it and more or less, act as a preventive agency rather than let the thing develop. If anything had developed that night, I would have stepped in between them and talked to them myself.

Q. What I am asking is, besides the events you described, there was nothing else, or other incidents that took place that you were concerned about? A. Not that I'm aware of, no. There was nothing.

(70) Q. Do you know if any of the officers on duty that night met with administrators or Mr. Butler, who were on duty with you, or Supervisors that night, to discuss the incident, to make recommendations? A. No, definitely.

Q. Definitely not? A. No, it would have—the only one that he would have consulted with would have possibly been me.

Q. Since you were in charge that night? A. Since I was in charge I was ultimately responsible for what happened. He would have consulted with me. He didn't. I submitted the report. I had been in contact with him during the evening on the specified times I mentioned before and that was it. I went home and what happened during the day, you know, the next day—

Q. The usual procedure is, if Mr. Butler and any other Supervisor wants to know what happened on a shift, he would go to the person in charge of that shift for further information? (71) A. Well, he would go through channels, shall we say? In the case of this report, as you said, Exhibit 2, I naturally, made this report out to Mr. O'Mara who is my immediate superior, but in the sense that Mr. O'Mara lives off the grounds, in a situation like that I report to the Superintendent. Mr. Otis, I believe, was away. He was in Jersey or somewhere. So it was easier

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

for me to contact Mr. Butler, but my duties say that I should, at least—you know, the chain of command had to be observed and I made the report to Mr. O'Mara.

Q. Mr. O'Mara was physically on duty that night? A. No, he wasn't.

Q. And neither was Mr. Otis? A. No, Mr. Otis was, I think away.

Q. Mr. Butler, you said lives on— A. He lives on—Mr. Otis lives on the property, but I believe Mr. Otis was away. I just don't know where he was, but he wasn't on the grounds.

Q. All right.

Just briefly, we talked about the general situation in Wallkill, as opposed to other (72) prisons.

In your opinion, there is quite a difference, I think, between Wallkiil and other institutions; is that right? A. Have you ever been in another institution?

Q. Not like you have; no. A. Yes, there is. I would say there is. I would have to say there is. I like the Wallkill Program. I think it's a good program.

Q. What are you referring to when you say the Wallkill Program? A. Well, the type of setting, no walls, no cell blocks. You know, small population. This is the future of the prison system right here.

Q. You think this has an effect, from your observation on the attitudes of the inmates themselves? A. I believe it, yes.

Q. I take it there is a difference in program, as well; specific programs, rehabilitation? A. Now, you're asking for an evaluation that I can't give. I can't compare one program to the other. All I can compare is the (73) physical setting, the size of the population, the atmosphere. Yes, I can—

Excerpt From Deposition of Lt. Arthur Connolly, Admitted as Part of Exhibit No. 1 at Trial.

Q. In all those ways you find a substantial difference between Wallkill and other institutions you've been at? A. Yes, indeed. Yes, indeed. A vast difference.

Q. There's much less restrictions on the inmates? More freedom at Wallkill? A. As I said, yes, Wallkill, the atmosphere is difference. The communication between the officers is vastly different.

Q. The number of restrictions on the inmates—freedom is greatly different? A. I would say so. I would be lying if I said it wasn't.

Q. And, in fact, inmates are allowed to join other kinds of groups, I take it, programs that go on here? A. You would have to say what programs you mean.

Q. J.C.'s and so forth? A. Yes, yes.

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Excerpt From Deposition of Sgt. Walter Alexander, Admitted at Trial as Part of Exhibit No. 1

[Exhibit No. 1, pp. 105-107].

(105) By Mr. Pachoda:

Q. You mentioned that some of the inmates were upset because they felt that their actions in signing the Petition might get them in trouble and that they could be identified; is that right? A. That's—identified by their own signatures, they could be identified. Not by me personally, because I had no knowledge whether they signed it or not.

Q. When you say that, do you mean that they were concerned, in terms of the Administration of the prison, they would be upset with them for signing this petition because their name would be on it? A. That seemed to be the feeling of the inmates. I have no idea what the official feeling of the Administration was.

Q. Just the feeling? A. The feeling of the inmates seemed to be that of, I might get myself in trouble, now that they—this thing seems to have been (106) brought to a head. Merely just to they signed it, no, because if they felt that way they would not have signed it in the beginning.

Q. So it was after the Liaison Committee went on the air— A. This Liaison Committee is a fairly new thing in the institution. The Liaison Committee, supposedly—this is the word we got later, that they thought they were doing it because of the Liaison Committee's sanction.

Q. Yes. A. And that they said, here's the thing to do. We'll sign it because the Liaison Committee says it's okay. They're the new thing. They're talking with the Administration, so it will be okay now.

Q. And when they found out that the Liaison Committee was not in favor of it they felt that they could possibly get in some trouble—the inmates now? A. The Liaison Committee was not in favor of it? They had not sanctioned it. The inmates had been told when they signed it.

Excerpt From Deposition of Sgt. Walter Alexander, Admitted at Trial as Part of Exhibit No. 1.

Q. After they found out that the Liaison Committee (107) did not sanction it, some of the inmates thought that they could create trouble with the Administration, for having their names on it? A. That seemed to be the inmates' feeling.

Q. Let me ask you this, then: You said you received some reports during that week, oral reports. Did you receive any written report from any officer? A. I received none, no.

Q. Did you make out any? A. No. None.

Q. About any specific incident? A. No, I did not. There was nothing that I could point to specifically that would say such-and-such is the case.

Q. Right.

Mr. Pachoda: I have no further questions.

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Excerpt From Deposition of Warren Barnes, Admitted at Trial as Part of Exhibit No. 1

[Exhibit No. 1, pp. 130-131].

(130) Q. Were you aware generally of a feeling that might generate physical violence in the institution during the week of June 2nd through June 8th? A. My impression with the institution was no, there was no threat of physical violence as such, though there was a continuing unrest regarding this action of the Liaison Committee, as well as, and primarily and I may quote my feelings as written—Am I going to get into any difficulty about this?

Q. Inmates were concerned at that point and tense to a certain extent because they thought they may get into some difficulty for signing the petition? A. A concern heightened by our announcement.

Q. Right. And that created the tension during that week at Wallkill? (131) A. That assisted.

Q. At some point, you resigned from the Committee; is that right? A. Yes, I did.

Q. It was after at least that week of June 9th? A. Sometime after that. Now, that I'm thinking, it would have to be roughly—I remember a series of vague events—it would have to be three weeks to two weeks.

Q. And a replacement got selected or how did a replacement get selected? A. There was no replacement.

Q. At the moment there were five members of the Committee? A. I can't say for the moment, but no representative for the Liaison Committee on the gallery, anyway.

Q. Was the Liaison Committee involved in generally now —with setting up the rules in the institution or regulations in terms of the behavior of inmates? A. None whatsoever. We only declare and define what we don't do.

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Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

[Exhibit No. 2, pp. 32-33, 44-62].

(32) Q. Were you at the prison during the weekend? A. I would assume I worked that weekend; yes.

Q. Did— A. I know I did. I was there.

Q. I see. Going to the weekend, were you on duty Friday evening, June 2nd? A. No, I wasn't.

Q. You were not physically on duty Friday evening? A. No.

Q. Were you on duty, Saturday, June 3rd? A. I was.

Q. Do you recall the hours you were on duty? A. Chances are, it was 8 to 4.

Q. Probably 8 to 4? A. Probably.

Q. We could check that by the records? A. I think so. It was either 7 to 3 or 8 to 4.

Q. I see. And then, on Sunday— A. It would definitely be 8 to 4.

Q. Definitely be 8 to 4.

Now, are you basing this first sentence on your own personal observations or (33) reports you received from personnel here at the institution, when you say there was a considerable amount of abnormal activity? A. I am sure that I based it on reports received from other people.

Q. Do you remember who the persons were that you received those reports from? A. Not per se, but I think Lieutenant Connolly called me at my home, Friday night or —it had to be Friday night.

Q. Do you recall what Mr. Connolly said at that point? A. No, it had something to do with this activity around the institution.

Q. Let me show you Plaintiff's Exhibit 2 and 3 and ask you if you've seen those before?

(Handing.)

Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

A. Well, I'm not sure if I've seen it, per se, I don't know, but I'm sure we probably discussed it with Connolly.

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(44) Q. And under what circumstances did you decide to write this report? A. Well, the fact that I was in charge of the institution over the weekend, certain knowledge came to my attention that I felt should be passed on.

Q. I see. So you felt in your normal course of duty that you should write this report? A. Of course. Sure.

Q. Have you been asked by anybody specifically to write this report and indicate who you felt was involved in the petition? A. No.

Q. No? A. No. No.

Q. Now, on Page 2 of this Exhibit, the first sentence reads, "The following named inmates have reported as being very active in circulating the petition." Again, I take it, that you, yourself—this is not firsthand information, but reports that were made to you? A. That's right.

(45) Q. Now, the first name is Sostra and next to it you have, prime mover and instigator. How did you receive that information? A. I can't tell you that, but I assume from people who gave information to me; employees and some inmates.

Q. Some inmates also told you this? You don't know the names of any of these people? A. Not offhand.

Q. And what evidence then did they have that Mr. Sostra was the prime moving instigator? A. I am not sure. I don't know.

Q. The name, next name is Lucas, No. 9659 and next to his name, you have, reports indicate that he and Sostra in concert with legal aid instigated the petition. Can you indicate, if you know, who made that report? A. I don't know that offhand. I don't know.

Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

Q. You don't know, yourself, personally, for example, if Mr. Lucas ever spoke to anybody from the Legal Aid Society? A. Right.

Q. The third name is No. 9917, Passanante and next (46) to his name, you have, had petition in possession and was also reported by Lieutenant Connolly as expediter. So you received information from Lieutenant Connolly about Passanante? A. That's right.

Q. And, then, the other incident about Mr. Weller, you believe, had taken the petition from Passanante? A. Right.

Q. And the next name is No. 9372, Kenny, and have next to his name, Actively seeking signatures. Again, this is also a report you received from someone? A. Somewhere along the line; right.

Q. You are not sure where? A. Not certain.

Q. Next name is No. 9673, Oliver, and you also have, actively seeking signatures. A. This information came to me, but how, I don't really recall.

Q. No. 9890, Rosario, actively seeking signatures. Has been very active with Sostra of late. Again, all of that comes to you from other people? (47) A. right.

Q. No. 9704, Newkirk, reported by Lieutenant Connolly, as actively involved in securing signatures. That came through Lieutenant Connolly, I take it? A. I think so.

Q. Further conversations, to the best of your knowledge, after the Friday night phone call with Lieutenant Connolly about what took place on Friday night? A. I assume so. I don't remember offhand. I don't know.

Q. Number—the last name is No. 9272, Rodriguez, and next to his name, it says, Reported as being Sostra's contact with the Spanish population. I again, I assume that's reported— A. I picked up somewheres along the line.

Q. Did, you, yourself, speak to any one of these named

Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

inmates? A. No, I didn't. Oh, Passanante. I remember talking to Passanante.

Q. You did not speak to anyone but Passanante? A. That's right.

Q. Do you know of any of the reports that you received (48) from Officers, if they were based on conversations with any of these inmates, except for Passanante? A. I don't know that.

Q. You don't know that? A. No.

Q. All right. Now, when did you speak to Mr. Passanante? A. I believe I spoke to him the morning that they picked up the petition.

Q. That was Saturday morning? A. Saturday morning.

Q. And you called Mr. Passanante in? A. He was right there knocking on the door.

Q. And what was he concerned with? A. I don't know. He was concerned about the fact that they had taken the petition from him.

Q. Did you explain that it was necessary to do this? A. I assume I did.

Q. Was there further discussion about the petition, or the union, with Mr. Passanante, at that time? A. I don't remember. I don't recall.

Q. Did you ask Mr. Passanante who else was involved in the union? (49) A. I may have. I may have. I don't know.

Q. But this report itself was taken— A. I would assume I asked him, but I don't—

Q. Do you know if this report is, in any way, based on the information you received from Mr. Passanante? A. The entire report is based on information I received from Passanante?

Q. Well— A. Or if any part of it is based on the report I received from Passanante?

Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

Q. Yes. A. Again, I will assume that I must have received some information from Passanante, which I probably incorporated in the report. I don't know. I don't know specifics.

Q. But, I take it, there were also other reports from correction officials on each and every one of these inmates that were involved in some way, with the exception of Passanante, in terms of the comments you have here. You had other independent reports from correction officials— did you? Did you have other reports from personnel, other (50) correction personnel? A. Written reports?

Q. Written or oral? A. I assume that's so. I assume that's so.

Q. Now, you go on to say that there is a rumor received from several sources, that an attempt is being made to dump Barnes off the ILC. Can you explain in that who is Barnes and the ILC? A. Barnes is a member of the Inmate Liaison Committee and if I am right, I think I am thinking right, I think that Barnes made a speech to the population on Friday night and that the Liaison Committee was not behind this particular petition, and of course, the story the next day was ripe, there were rumors running that they were going to try to dump Barnes because of his activities the night before.

Q. Again, do you know, to the best of your recollection, specifically, what the several sources were? A. No, I can't —I don't know.

Q. Again, you don't have personal information about this, personally? You did not personally know, (51) for example, if Sostra may have been behind this? A. No, no.

Q. And then your final concluding sentence, when you say, "It seems quite evident that Sostra had seized on this issue as a means of embarrassing the administration, and thereby reasserting his preeminence as the great emanci-

Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

pator." This conclusion is based on these other reports that you received? A. I would assume so.

Q. Do you know what happened to this report after you wrote it? A. Well, I sent it to Mr. Butler.

Q. That probably was June 5th, Monday? A. Oh, yes.

Q. Did Mr. Butler then question you about it? At any subsequent time on Monday or Tuesday or Wednesday? A. I don't know. I don't know.

Q. Exhibit 13, which is a report dated June 6th, do you recall writing that on Tuesday, June 6th? A. Yes, I did.

(52) Q. This, again, is a report to Mr. Butler from Mr. O'Mara, and the subject is Recommendation for Transfer. And the first sentence, states, "After consultation, Lieutenant Henry and Stark, as well as several officers, the following named inmates are recommended for transfer:" Is this a consultation that you had with Lieutenant Henry? A. Yes, sir.

Q. And when did this consultation take place? A. I would assume that morning.

Q. The morning of June 6th? A. Yes.

Q. And Lieutenant Henry is a Correction Officer here at Wallkill? A. He is a Lieutenant here at Wallkill.

Q. And what information did Lieutenant Henry have about the— A. What specific information?

Q. Yes. I don't know how this contributes to the—you mean, specifically?

Q. Yes. (53) A. I don't know.

Q. Did you meet Lieutenant Stark also on that morning? A. Yes, I did.

Q. Was the meeting together, at one time? A. I don't know. I don't think that we had a formal meeting; perhaps, I went around to see Henry and see Stark and these other officers. I think that perhaps that's the way it was done.

Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

Q. I see. Were there any specific officers that you selected as having more information about this than others? A. Not necessarily; not necessarily.

Q. It was kind of a random selection? A. I would think so. I would think so.

Q. Do you know if Lieutenant Henry was on duty on the night of June 2nd? A. I would not believe so. If Lieutenant Connolly was on, then Lieutenant Henry would not be on. So the chances of the two of them being on would be very slim.

Q. I see. The same would be true for Lieutenant Stark. He would not have been on either? (54) A. I don't think so, no.

Q. Did Lieutenant Henry have firsthand knowledge of the activities, or the alleged activities of the named inmates? A. I don't know that either.

Mr. Greenwald: Did he have firsthand knowledge?

The Witness: I don't know that.

Q. Do you know if he, when you wrote this report, if he, himself, had actually observed what took place? A. I don't know.

Q. And that would be the same for Lieutenant Stark? A. I assume so; right.

Q. When you say inquiries from several officers, did you know, again, who those officers were? A. No.

Q. You don't know if they were passing on information that they had seen with their own eyes, or just received in the general course of duty? A. That's right.

Q. Again, before you made this report, had you spoken to any of the other inmates named? That is Sostra, Lucas, Newkirk, Rosario, Rodriguez, Oliver (55) Kenny—and of

Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

course, Mr. Passanante, you did speak to. But any of these? A. No.

Q. The last sentence reads, "Passanante is very scared and apparently willing to cooperate." What did you base that conclusion on? A. Well, I based that conclusion on the fact that he was foolish to lose the petition and he was quite scared. He was quite concerned that it might affect him in some way. I don't know, how it would affect him; whether he felt that the people behind the petition might do something. I don't know. But he gave me the appearance of being quite scared.

Q. He was nervous— A. Right.

Q. —about some reprisals being taken? A. Yes.

Q. Was he nervous that possibly, whether it was justified or not, that the Administration would be unhappy for him for this activity?

Mr. Greenwald: Wait a minute. Purely speculative, as to why he was nervous.

(56) Mr. Pochoda: I am asking—the objection is noted.

Q. Did Mr. Passanante indicate that he was concerned about possible reprisals from the prison administration? A. I don't know that specifically, no.

Q. He did not indicate that? A. I don't think so.

Q. He did not indicate what he was nervous and scared about? A. No.

Q. When you say, apparently willing to cooperate, what does that mean? A. Well, I felt that if we had done a little talking to Passanante, we might find out a little bit more about how this thing originated and so on.

Q. Was more talking done with Passanante after that Saturday morning discussion?

Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

Mr. Greenwald: If you know.

A. I think so. I don't know, but I assume, if this was my feeling, then I would probably make an effort to get more information.

Q. And do you recall meeting with Mr. Passanante then, after that Saturday morning? (57) A. I don't recall, specifically. I would assume that I did.

Q. But no information stands out in your mind? A. No.

Q. No? A. Not particularly, no.

Q. Under what circumstances was this report, Exhibit 13, made? A. I am going to assume again—I think I'm right—that Mr. Butler told me to go out and find out what I could and who was responsible, by talking to the various officers and people. Based on my talking to Lieutenant Henry and Stark and the officers, these names came up as the prime movers of this thing. This is my reply to Butler's request to go and find out.

Q. Do you recall when Mr. Butler made this request? I recall when he made it?

Q. Yes. A. No. I would assume it was made the morning that the report was written.

Q. An oral request? A. I think so, yes.

(58) Q. Prior to this report, Exhibit 13, I take it some discussion about transfers and the possibility of transfers had taken place? A. With who?

Q. With Mr. Butler or Mr. Otis or some people in the institution or was this subject, Recommendation for Transfer, was this the first time, to your knowledge, that yourself, or anyone in the institution, talked about the possibility of transfer, your report here? A. Transfer in connection with this incident?

Q. Yes. A. I'm not certain if that's the first time, but

Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

I assume that that was the reason for me going out and getting the information and writing the report.

Q. Right. So that prior to writing the report, there was some feeling that possibly a transfer would be called for in this case because of the activity of the petition? A. I think that's a reasonable assumption, yes.

Q. Do you recall, to the best of your knowledge, who had mentioned first to you, the possibility of a (59) transfer? A. No, I don't, but that is the Superintendent's prerogative. I don't know.

Q. So, did you attempt to make it clear that you felt —or you attempted to find out who was the person most involved with the union petition and these are the ones you felt should be recommended for transfer? A. I think that's right.

Q. Let me ask this just for background. Is this a usual procedure, that recommendation for transfer will be made by you? A. By the Deputy Superintendent.

Q. By the Deputy Superintendent. I see. And then— but you— A. I think I was acting in that capacity that day. I believe I was, anyway.

Q. I see. So you really took the place of the Deputy Superintendent in this case? A. Yes.

Q. And you received information with—from your consultations with different officers that these inmates were the most active in the activity that (60) took place concerning the union petition; is that right? A. That seems so.

Q. And on that basis, you recommended them for transfer; is that right? A. That's right.

Q. Did you speak to any of the inmates in the Liaison Committee prior to making this report? A. You mean, formally?

Q. Or informally, about the events that led to the recommendation for transfer? A. I'm not sure of that. I

Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

know I didn't formally, but I may have informally, but I'm not sure.

Q. Now, this report, I take it, was sent to Mr. Butler? A. That's right.

Q. And probably arrived on the same date, June 6, 1972? A. Yes, sir.

Q. Did Mr. Butler, then, have further discussion with you about the subject of this report? A. I don't remember that. I don't know.

Q. Do you recall having further—well, did you make (61) any other reports. Let me put it that way. Written reports about possible recommendations for transfer, or any other written reports about who was involved in the petition? Besides these two exhibits here? A. No, not to my knowledge.

Q. Do you recall any meeting that you took part in with Mr. Butler and perhaps, other persons, who might have knowledge about the union activities, to discuss the situation and possible transfer? A. Gee, I don't remember. No, I don't.

Q. To your best of your recollection, after you submitted this report, the decision was then up to Mr. Butler? A. That's right.

Q. And at some point later, he decided to transfer? A. He recommended that they be transferred.

Q. I see. Did you engage in any further discussion about any of these inmates individually, as to whether some of them should really be transferred and some shouldn't? Or that was pretty much the end of this recommendation for the eight of them to be transferred? (62) A. I think as far as I was concerned, that was the end of my activity, as far as the recommendation goes. Mr. Butler made his own decisions after that.

Excerpt From Deposition of Assistant Deputy Superintendent Edward O'Mara, Admitted as Part of Exhibit No. 2 at Trial.

Q. I see. And again, this report on June 6th, Exhibit 13, as in Exhibit 12, the—was based on information you received from other officers about the activities that took place on the weekend? A. That's right.

Mr. Pochoda: I have no further questions.

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Exhibit No. 3 at Trial.

THE WALLKILL STORY

Wallkill Correctional Facility is the only medium security type Facility in the State of New York. It was established in 1932 for training and rehabilitation of convicted adult felons.

Wallkill does not receive any men committed directly from the courts. In 1940 a method of selection of prisoners from maximum security institutions was established. The selection procedure consists of periodic visits to the maximum security facilities by the Wallkill Correctional Facility Guidance Supervisor and the Vocational Supervisor. These men make an extensive study of the records of all inmates committed to the maximum security facility since their last visit to that institution. Those meeting the Wallkill criteria, and are likely to benefit from its program, are then interviewed and those passed by the selection committee are referred to the Superintendent of Wallkill, who screens the list and makes his recommendations to the Commissioner of Correctional Services for transfer. The criteria for selection provides that first offenders receive preference, however, the type of offense does not necessarily rule out a man for transfer. The idea is to select a man who will adjust to the Wallkill type of administration and be likely to benefit from its program. An exception to the foregoing selection procedure is the transfer of inmates from the Elmira Reception Center which was established in 1945. These young men range in age from sixteen to twenty-one inclusive. Those who appear to need the kind of training provided at Wallkill are selected by the Center Staff and sent to the Wallkill Correctional Facility. Approximately ten percent of the Wallkill population has been transferred from the Reception Center.

Exhibit No. 3 at Trial.

Custody and discipline, though less evident at Wallkill than at other facilities, are nevertheless important administrative considerations. The lack of physical and mechanical barriers are compensated for by more accurate classification, individualized treatment, good management of an alert and well trained staff, and development in the inmate of a sense of personal responsibility.

In order to achieve the aims for which Wallkill Correctional Facility was organized, an extensive program has been developed. This program is not superimposed on the men, but is decided upon only after careful consideration of each individual case by the members of the Program Committee and, finally, adopted with the active participation and acceptance by the inmate concerned. A psychologist and psychiatrist are available to inmates for counseling, guidance and testing.

A program of Group Counseling, led by trained staff members is available for inmates with certain types of problems. These sessions, which are not dominated by the employee in charge, give the men an opportunity among themselves to work out their personal problems, and even to "let off steam".

The leader is simply present to help keep the men on subjects which they set out to discuss and to help them arrive at conclusions. The Group Counseling program in New York was started at the Wallkill Correctional Facility. It has succeeded to the point where it has since been inaugurated in numerous other New York State Correctional Facilities.

The Service Unit, a cooperative agency staffed by members of the Department of Correctional Services Mental Hygiene and the Division of Parole, functions as the coordinator of the various services available to the inmate

Exhibit No. 3 at Trial.

as a casework agency. It is concerned with the follow-up and the progress of the man during his stay at Wallkill, with a view to continuous planning in terms of the man's capabilities for post-institutional adjustment. Through personal interviews, liberal correspondence privileges, and daily visiting privileges, the Service Unit attempts to strengthen the inmates' interest and relationship with the family and responsible community members.

Educational Achievement Tests, given to men upon reception, show that their school rating varies from complete illiteracy all the way through high school. No one is compelled to take any form of training unless he is not able to read and write simple English. To meet the demands created by the individual differences of the inmates, three specific types of education have been made available:

1. *Grammar School Subjects*—leading to a grammar school diploma.
2. *High School Subjects*—These courses are offered to satisfy individual needs in areas of particular interest or weaknesses of the men.
3. *Home Study Courses*—are offered from recognized Correspondence Schools and approved Colleges and Universities.

There are also scholarships in graphic arts made available to talented inmates by the Famous Artists Schools.

The ability to earn a living for one's self and family is necessary for success in the community. Therefore, teaching men how to work and how to practice a marketable vocation is an important part of the Wallkill program.

The material taught in each trade is selected after an analysis of industrial requirements. The aim is to develop skills which will enable a student to qualify in a paying

Exhibit No. 3 at Trial.

occupation. While developing manipulative skills, every man enrolled in organized trade training must pursue studies in related theory and trade information.

On the job experience is afforded to advanced students in the vocations when they become qualified. Their training is thus continued under expert supervision on live work. In the building trades, for example, it includes the manufacture of cement blocks. Many thousands of dollars are saved for the State each year by students in the vocational automotive shop. These men repair cars that have become worn or are completely wrecked. This training includes body and fender work and upholstering and painting. When a car comes out of this shop it is in perfect operating condition and often looks like a new car. All work must conform to the high standards demanded by the State.

In many of our shops work is done for numerous other State Departments, particularly the Conservation Department. This institution has furnished ski lifts, park and other furniture and work on mechanical equipment. We do a great deal of silk screen work for this department.

Signs of all types are produced by the silk screen process and may be seen throughout the State.

Organized Trade Training is conducted in the following areas:

Building Trades:

Carpentry, Electricity, Plumbing and Heating and Masonry

Industrial Trades:

Auto Mechanics, Blacksmithing, Machine Shop, Welding, Mechanical Opthalmic Optics, and Sheet Metal and Heating

Exhibit No. 3 at Trial.

Service Trades:

Baking, Barbering, Food Service, Laundering, Tailoring, Radio and Television Repairs, and Steam Engineering and general maintenance work

Wallkill Correctional Facility maintains a large farm of approximately 850 acres. A large variety of food crops, vegetables, milk, pork, chickens, eggs and apples are produced and supplied to other facilities, as well as Wallkill. (Milk is produced for Wallkill and Ossining Correctional Facilities). The farm work is carried on in such a manner as to teach those from agricultural areas improved farming methods. Garden products of a large variety are prepared in a modern canning plant maintained by the Wallkill Correctional Facility.

International Correspondence School courses in many vocational areas are provided for those who desire them.

Men wishing to increase their ability in public speaking may also enroll in Dale Carnegie Courses.

Under the direction of the Music Teacher, a large number of men, many of whom have never played instruments, become competent musicians and, eventually members of the institutional music organizations.

Great emphasis is placed upon the importance of religion in the rehabilitative program. This work is under the leadership of resident Chaplains, one of the Catholic and one of the Protestant faiths. There is also a part-time Chaplain of the Jewish faith. Christian Science Services are also provided. The Chaplains provide regular worship services on Sundays and Holy Days, conduct classes of instruction throughout the year and are available for counseling and guidance with the inmate during the week. They all perform a valuable function in ministering to the needs and problems of inmate's families.

Exhibit No. 3 at Trial.

The nature of congregate living makes strenuous demands on good health, sanitary, and hygienic conditions among the inmate population. Supervising this important area, prescribing high standards of preventive medicine and administering to the ill, is a medical staff composed of a resident physician, five registered nurses, a visiting surgeon, an optometrist, an opthalmologist and a part-time dentist. Emphasis is placed on the prophylatic type of treatment as well as the therapeutic. The food served is wholesome but does not exceed the cost allotment of the other correctional facilities.

An excellent recreational program under a trained supervisor is maintained. This man encourages participation in sports and tournaments in the institution. One of the chief objectives is to teach men to play fairly and familiarize them with the rules of good sportsmanship. This is a particular need among city raised individuals who have had little opportunity for development of cooperative sportsmanship.

Exhibit No. 4 at Trial.

Authorization For Union Membership

We, the undersigned inmates at Wallkill, Correctional Facility, Wallkill, New York, do hereby join the Prisoners' Labor Union at Wallkill and authorize it or its agents to act as our collective bargaining agent in all matters pertaining to our wages, hours and conditions of employment with any and all persons or agencies having responsibility for or control of the foregoing.

Signature	Print Name	Number	Date

Exhibit No. 5 at Trial—Letter From Daniel Pochoda, Esq., to New York State Public Employees Relations Board.

July 12, 1972

Mr. Paul Klein
Director of Public Employment
Practices and Representation
Public Employees Relation Board
50 Wolf Road
Albany, New York 12205

Dear Mr. Klein:

Enclosed are those original signed authorizations presently in my possession, as well as an alphabetized list of these 199 persons.

Sincerely,

Daniel Pochoda
Staff Counsel

DP/ms
enc.

Exhibit No. 6 at Trial.

State of New York

Public Employment Relations Board

Petition

For Certification and/or Decertification

Instruction. Submit an original and three (3) copies of this Petition to the Director of Public Employment Practices and Representation, New York State Public Employment Relations Board, 50 Wolf Road, Albany, N.Y. 12205. If more space is required for any item, attach additional sheets, numbering item accordingly.

Do Not Write In This Space

Case No.:

Date Filed:

The petitioner alleges that the following circumstances exist and requests that the New York State Public Employment Relations Board proceed under its proper authority.

Purpose of this Petition. (Check only the boxes that are appropriate).

A. ☒ Certification of negotiating representative—A substantial number of employees wish to be represented for purposes of collective negotiations by Petitioner and Petitioner desires to be certified as representative of the employees for purposes of collective negotiations pursuant to Section 207 of the Law.

B. ☐ Representation (Employer)—One or more employee organizations have presented a claim to Petitioner to be recognized as the negotiating representative of employees of Petitioner.

Exhibit No. 6 at Trial.

C. ☐ Decertification—A substantial number of employees assert that the currently recognized or certified negotiating representative is not their representative as defined in Section 207 of the Law.

Name of Petitioner:

Prisoner's Labor Union at Wallkill.

Affiliation, if any:

District 65, Distributive Workers of America (see item 15).

Address of Petitioner (No. & Street, City & Zip Code): c/o Prisoners Rights' Project, 119 Fifth Avenue New York, N.Y. 10003.

Name of Employer:

State of New York, Department of Correctional Services.

Address of Employer (No. & Street, City & Zip Code):

State Office Building, P. O. Box 7033, Albany, New York 12225.

Description of negotiating unit claimed to be appropriate. (Be complete and specific, using job titles):

Included:

All inmates incarcerated at Wallkill Correctional Facility Wallkill, New York 12589.

Excluded:

All other employees.

Exhibit No. 6 at Trial.

6a. Number of employees in unit: 490.

6b. Is this Petition supported by:

(1) 10% or more of the employees in the unit? ☒ Yes ☐ No.

(2) 30% or more of the employees in the unit? ☒ Yes ☐ No.

Does the Petitioner seek exclusive rights of representation? ☒ Yes ☐ No.

Request for recognition as negotiating representative was made 6/9/72.

☐ Has not replied. (Explain on rider, if necessary).

☒ Declined recognition on 6/13/72.

Recognized or certified negotiating agent:

Name: None.

Address:

(If there is none, so state).

Affiliation:

Date of recognition or certification:

10. Employee organizations other than Petitioner (and other than those named in Item 9 above) which claim recognition as negotiating representative, and other employee organizations known to have an interest in representing any employees in the unit described in Item 6 above. (If none, so state).

Exhibit No. 6 at Trial.

Name	*Address*	*Affiliation*	*Date of Claim (Required only if Petition is filed by employer)*
.....			
.....			
.....			

1. If the above-named employer is a party to a contract dealing with terms and conditions of employment: (If there is none, so state).

   (a) Name of the other party to the contract: District Counsel 82, AFSCME AFL-CIO

   (b) Date of expiration of the contract: .....

   (c) The negotiating unit specified in the contract: Correctional Officers

   (d) Is a copy of the contract attached? ☐ Yes ☒ No

2. Is this matter subject to Section 206.1 or 212 of the Law? ☐ Yes ☒ No

3. If you have checked Box 1. A. above:

   (a) If an employee organization, have you filed financial reports with the New York State Department of Labor as required by Labor Law § 726? ☐ Yes ☒ No; or with the Board of Regents as required by Education Law § 237? ☐ Yes ☒ No

   If a membership corporation, was your certificate of incorporation approved by the New York State Board of Standards and Appeals pursuant to Membership Corporation Law § 11(1)(a)? ☐ Yes ☒ No

   (b) Do you affirm that you and the employee organization that you represent or support, do not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist, or participate in such a strike? ☒ Yes ☐ No.

Exhibit No. 6 at Trial.

4. If you have checked Box 1. C. above:

   (a) State the grounds upon which the certification should be revoked or the recognition annulled.

   (b) Has the employee organization currently recognized or certified by the public employer engaged in a strike or caused, instigated, encouraged or condoned a strike against any government? ☐ Yes ☐ No

   (c) Is the employee organization currently recognized or certified designated as an exclusive negotiating representative? ☐ Yes ☐ No

5. Include a clear and concise statement of any other relevant facts. The Affiliation referred to in item 2 is subject to ratification by the membership of both unions.

I declare that I have read the above Petition and that the statements herein are true to the best of my knowledge and belief.

Prisoners Labor Union at Green Haven
(Petitioner and Affiliation, if any)

By ..... Attorney .....
(Signature of representative or person Filing Petition) (Title, if any)

Daniel Pochoda

Dated: June 26, 1972

ERB 1 (9-69)

Exhibit No. 7 at Trial.

Dated: June 5, 1972

To: H. N. Butler, Superintendent

From: E. O'Mara, Assistant Deputy Superintendent

Subject: Abnormal inmate activity.

During the weekend there was a considerable amount of abnormal activity among the inmate population.

As you are aware, A. Connolly, Lt. reported a petition relative to a "Prisoners Labor Union" was being widely circulated among the population for signature. This activity took place on Friday evening, June 2, 1972 and continued to a lesser degree on Saturday, June 3, 1972. A copy of the petition was confiscated from #9917 Passanante, which contained three (3) names. Inquiring as to source of the paper and printing indicate that it was introduced by outside sources. It has been reliably reported a petition with 225-250 signatures is in the population. Attached to the confiscated petition was a newspaper clipping of the "Labor Union" incident at Green Haven Correctional Facility with a picture of Rep. Herman Badillo posted to it.

Several officers have reported that individual inmates expressed regret and apprehension about having signed the petition. All employees feel certain that #9273 Sostre is behind all of this activity. He was observed moving all over the institution on Friday evening and again on Saturday in the A.M. There is also a rumor that individual inmates assigned to the Main Shop have been urged not to report to work on the Ambulance Building project unless monetary considerations are exercised.

Is it coincidental that this activity sprung into being shortly after the Inmate Laison Committee raised the subject of "Premium Wages" for "off the institution grounds work"? I know the I.L.C. has disavowed any part in this activity but I wonder about the timing.

Exhibit No. 7 at Trial.

On Sunday, June 4, 1972 I received a phone call from Lt. McMahon informing me that information had been received indicating some kind of trouble on C&D galleries at 7:00 A.M. I reported to the institution to assist but the rumor proved to be false. However, several officers reported they had received information that during the move on Saturday evening there was a considerable amount of vocal expression relative to race expressed while the lights were out. Evidently the picture shown denoted racial conflict and some members of the population reacted to it.

As of this writing at 11:30 A.M., Sunday, June 4, 1972 there is no evidence to indicate any undue problems.

The following named inmates have been reported as being very active in circulating the petition.

#9273 Sostre—The prime mover and instigator.

#9659 Lucas—Reports indicate that he & Sostre in consort with Legal Aid instigated petition.

#9917 Passanante—Had petition in possession and and also reported by Lt. Connolly as expediter.

#9372 Kenny—Actively seeking signatures.

#9673 Oliver—Actively seeking signatures.

#9890 Rosario—Actively seeking signatures—has been very active with Sostre of late.

#9704 Newkirk—Reported by Lt. Connolly as actively involved in securing signatures.

Exhibit No. 7 at Trial.

#9272 Rodriquez—Reported as being Sostre's contact contact with the Spanish population.

There is a rumor, received from several sources that an attempt is being made to dump Barnes off the I.L.C. and that Sostre is behind this. I have not been able to figure how this fits in with the recent activity.

It seems quite evident that Sostre has seized on this issue as a means of embarrassing the Administration and thereby reasserting his pre-eminence as the great emancipator.

Respectfully submitted

EDWARD O'MARA
E. O'Mara
Assistant Deputy Superintendent

EO/fe
cc: File

Exhibit No. 8 at Trial.

To: Mr. Butler, Superintendent

From: Ed O'Mara, Asst. Deputy Superintendent

Date: June 6, 1972

Subj: Recommendation for Transfer.

After consultation with Lt's Henry and Stark as well as inquiries to several officers the following named inmates are recommended for transfer in the order named:

1. 9273 Sostre
2. 9659 Lucas
3. 9704 Newkirk
4. 9890 Rosario
5. 9272 Rodriguez
6. 9673 Oliver
7. 9372 Kenny
8. 9917 Passanante

Passanante very scared and is apparently willing to cooperate.

ED O'MARA
Ed O'Mara
Asst. Deputy Superintendent

Exhibit No. 9 at Trial.

WALLKILL PRISON
INTER DEPARTMENTAL COMMUNICATIONS

Date June 2, 1972

FROM: A.J. CONNOLLY

TO: E. O'MARA, Dept. Supt.

SUBJECT: Circulation of Petition for Inmate Union

At 6 P.M. this evening C.O. Blake informed me that he observed a petition being circulated by inmates 9273 Sostre and 9890 Rosario D-1-18. He believed the petition concerned a union for the inmates.

At 7:15 P.M. C-1-29 came to me and told me that a serious situation was developing in the institution. He was asked to sign a petition for the organization of an inmate union. He said that he refused because the petition had not been cleared through the Inmate Liason Committee. He said that eight or nine inmates were canvassing the population for signatures. A newspaper article was attached to the petition. The article pertains to Herman Badillo's opinion regarding Inmate Union. He believes that inmates have the right to organize. [name deleted] felt that a prison setting is not the proper place for a union.

Mr. Butler was contacted and he advised me to convey all the information regarding the petition to the Liason Committee. They convened, and when they adjourned, requested they make a statement to the population over the P.A. They also requested that the statement be posted on all galleries. Mr. Butler approved these requests. Reaction after the announcement was observed at the key room. It appeared that some had signed the petition without reading it but there were some who felt that they should be able to sign any petition.

Exhibit No. 9 at Trial.

The following inmates were canvassers for the petition:

9273 Sostre B-3-24 idle

9890 Rosario D-1-18 Laundry

9704 Newkirk B-1-21 Trucks

9372 Kinney A-3-18 Kitchen

9673 Oliver B-1-30 Halls AB

Possibly, you can ascertain the rest of the group tomorrow.

Respectfully,

A.J. CONNOLLY

Exhibit No. 10 at Trial, Letter From Petitioner Butler to Superintendent Henderson, Auburn Correctional Facility.

July 13, 1972

CONFIDENTIAL

Superintendent Robert Henderson
Auburn Correctional Facility
Auburn, New York

RE: David Rodriguez—former Wk #9272

Dear Superintendent Henderson:

As a result of a continuing investigation concerning the incident which resulted in the transfer of David Rodriguez to your Facility, it has been determined that he was not as actively involved as our initial investigation indicated.

Although I do not think he should be returned to Wallkill, we do think that this information should be made available to those persons who are responsible for preparing his parole summary. He is presently eligible for parole on October 19, 1972, according to our records.

Very truly yours,

HAROLD N. BUTLER
Superintendent

HNB:s

Exhibit "B" at Trial.

CLINTON PRISON

REHABILITATION PROGRAMS AND SERVICES

I. EDUCATION

A. *General Education Classes*	*Grades*
Beginners Illiterate	1-2
Spanish-English Illiterate	1-2
Intermediate	3-4
Remedial Arithmetic	1-4
Advanced English	5-6
Advanced Mathematics	5-6
Junior High School English	7-8
Junior High School Mathematics	7-8
Junior High School Literature	7-8
High School Equivalency	7-10+
Citizenship and Government	8-10+
World History	9-10
American History	9-11+
High School English	9-12
Bookkeeping I	9-11
Bookkeeping II	10-12
Business Mathematics	9+
Elementary Algebra	10
Plane Geometry	9-10
Intermediate Algebra	11
Trigonometry	12
Solid Geometry	12
Spanish I	9-10
Spanish II and III	10-12
Commercial Art	-
Fine Art	-
Typewriting	8-12

Exhibit "B" at Trial.

Programmed Courses	*Grades*
Arithmetic of Whole Numbers I ...	1–2
Junior High School Mathematics I	7
Decimals and Percentage I	5
Decimals and Percentage II	6
Fractions I	4
Fractions II	5
First Year Algebra	9–10
Second Year Algebra	10-11
Plane Geometry	9–10
Calculus I	12–13
Calculus II	12–14
Contract Bridge	10+
Chess	4+
Mechanics	8–10
Motion	8–10
Meteorology	8–10
Map Reading	6–8
Business Mathematics	9–10
Accounting Process	9–10
The Constitution	6–8
United States Geography	5–8
Spelling	4–7
Grammar	4–5
Grammar Review	5–6
English Review	7–8
Elementary English 2200	5–6
Intermediate English 2600	7–9
Advanced English 3200	10–12
Building Vocabulary	6–8

B. *Vocational Training Shop*

BARBERING

Exhibit "B" at Trial.

C. *Related Trade Subjects* — *Grades*

NONE

D. *Music Instruction*

NONE

E. *Cell Study and Correspondence*

English	4–8
Mathematics	1–8
Bookkeeping	9–12
Business Law	9–12
Business Mathematics	9+
Biology	9–10
English Literature	9–12
American History	9–11+
World History	9–10
Reading Comprehension	5–9+

F. *Miscellaneous Courses*

College Proficiency Series	
Freshman English	13
Sociology	13–14
Calculus A and B	13–14
Accounting	13–14
American Government	13–14
American History	13–14
Western Civilization	13–14
Biology	13
Economics	13–14
College Proficiency Series	
Physics	13
American Literature	13–14
European History	13–14
Shakespeare	13–14

Exhibit "B" at Trial.

	Grades
Statistics	13–14
Spanish	13–16
French	13–16
Extension College Courses	
Electronics	13–14

G. *Physical Education and Recreation (Outdoors)*

Baseball	Track and Field
Softball	Bobsledding
Basketball	Skiing (Slalom)
Football	Ice-Skating
Horseshoe Pitching	

II. Industrial Shops

A. *Cotton Shop #1*

Manufacturers Cotton Section Beams which is a preparatory process to weaving.

Job Titles: Clerk—Research Clerk—Slasher Operator—Slasher Operator Assistant—Harness Operator—Reeder—Porter.

B. *Cotton Shop #2*

Process: Warp Cotton Section Beams.

Job Titles: Warper Operator—Winder—Creeler—Beam Man—Mop Yarn Maker—Mechanic—Porter—Elevator Operator.

C. *Cotton Shop #3, #4 and #5*

Process: Cotton Spinning.

Job Titles: Draw Frame Operator—Slubber Operator—Speeder Operator—Mechanic—

Exhibit "B" at Trial.

Oiler—Assistant Mechanic—Porter—Spinner—Doffer—Roll Coverer—Spindle Setter—Tape Sewer—Instructor.

D. *Cotton Shop #6*

Process: Cotton Preparation.

Job Titles: Picker Operator—Carder—Stripper—Doffer—Grinder—Mechanic—Porter—Runner.

E. *Weave Shop*

Product Manufactured: Woven Cloth.

Job Titles: Weaver—Mechanic—Head Mechanic—Needle Man—Warp Fitter—Filling Winder—Porter—Instructor—Trainee.

F. *Garment Manufacturing Shop*

Products Manufactured: Male Clothing.

Job Titles: Single Needle Sewer—Double Needle Sewer—Button Hole Maker—Button Attacher—Serger—Elastic Attacher—Zipper Attacher—Bar Tack Operator—Snap Fastener Operator—Tailor—Presser—Pattern Maker—Marker and Cloth Layer—Cutter—Mechanic—Assistant Mechanic—Clerk—Instructor—Trainee.

G. *Machine and Tool Shop for Textile Units*

Functions: Repairs Industrial Shop machines, tools, and equipment. Manufactures machine parts.

Job Titles: Machinist—Screw Machine Operator—Welder—Stock Clerk—Porter.

Exhibit "B" at Trial.

H. *Industries Storeroom for Textile Units*

Functions: Receives, checks and issues raw materials and supplies. Receives and checks finished products and prepares same for shipment.

Job Titles: Shipping Clerk—Baler—Floor Man —Runner—Clerk.

I. *Dye and Cloth Finishing Shop*

Functions: Mix dyes in accordance to formulas. Prepares cloth for bleaching, dying and finishing.

Job Titles: Raw Stock Dyer—Raw Stock Dryer —Kier Bleacher—Washer—Cloth Folder—Cloth Dryer—Extractor—Sanforizer—Assistant Sanforizer—Hemmer—Inspector—Mechanic — Trimmer — Clerk — Porter — Runner.

J. *Industrial Office*

Functions: Under the supervision of civilian office employees, perform various clerical and stenographic functions.

Job Titles: Payroll Clerk—Finished Goods Clerk—Purchase Order Clerk—Accounts Receivable Clerk—Raw Material Clerk—General Typist—Cost Clerk—Secretary to Superintendent—Runner—Porter.

III. Maintenance Shops

Carpenter Shop
Paint Shop
Sheet Metal Shop
Welding Shop

Exhibit "B" at Trial.

IV. Mental Hygiene Services

Psychiatric: One full-time psychiatrist and four part time psychiatrists who make a total of six visits every two weeks. Type of service: Diagnostic evaluations and individual psychotherapy.

Psychological: Two visiting psychologists make a total of four visits every two weeks. One devotes his time to intelligence and personality testing, the other to group counseling.

V. Specialized Rehabilitation Programs

Tuberculosis Facility
Plastic Surgery
Diabetic Program
Clinton Prison Diagnostic and Treatment Center in the Dannemora State Hospital facility.
Alcoholics Anonymous Program
Group Counseling Program—Psychological supervision
Hobby Craft Shop—Supplies and counseling

VI. Other Services:

A. Guidance and counseling services provided by Service Unit Personnel.

B. Religious services, instruction and pastoral counseling provided by chaplains of three denominations.

C. Medical and dental services.

Affidavit of Petitioner Harold N. Butler, in Support of Motion to Dismiss Complaint on Grounds of Mootness.

HAROLD N. BUTLER, being duly sworn, deposes and says:

I am the Superintendent of Wallkill Correctional Facility and a defendant in this action. I submit this affidavit in behalf of a motion to dismiss this action on the ground that it has become moot and academic by reason of subsequent events.

On February 22, 1973 Cornelius Lucas was released on parole from Wallkill Correctional Facility. At the present time he is under the supervision of the Division of Parole, and neither I nor Commissioner Oswald have any direct contact with him or any immediate control over his activities. Accordingly, I respectfully submit that Mr. Lucas' case be dismissed because the relief prayed for in his complaint is no longer necessary, and because the alleged harmful consequences of his transfer from Wallkill Correctional Facility on June 8, 1972, have not materialized.

With respect to any personal property which Mr. Lucas claims was improperly taken from him at Clinton Correctional Facility prior to his return to Wallkill, this was done under the auspices of the staff at Clinton, and was not done with my knowledge or authorization. On January 4, 1972 I wrote to Superintendent LaVallee at Clinton, on Lucas' behalf, asking him to check into the missing items of property. On January 17, 1973 the Acting Superintendent at Clinton wrote to me that the items which were taken from Mr. Lucas on October 16, 1972, were contraband. On January 22, 1973 I sent another letter to the Acting Superintendent at Clinton, explaining that Lucas had been issued the missing items prior to his transfer to Clinton, and did not accept the determination that they were contraband.* At the present time, since Mr. Lucas is on parole, there is

* I understand that these letters, which were given to Mr. Lucas, have been annexed to a letter to the Court from plaintiffs' counsel, dated February 27, 1973.

nothing further that I can do on his behalf because this matter involves a controversy between Mr. Lucas and the personnel at Clinton Correctional Facility, who are not under my supervision or control.

With respect to Mr. Newkirk, he was returned to his truck driving assignment on December 18, 1972. To the best of my knowledge, Mr. Newkirk has not been subjected to any intimidation or harassment by our staff as a result of his having brought this lawsuit, and has not been charged with any disciplinary offenses. I have discussed with Assistant Deputy Superintendent O'Mara the statements that he made to Mr. Newkirk and Mr. Lucas upon their return to Wallkill, and he advises me that he warned them that they would not be entitled to special treatment as a result of their re-transfer. He further advises me that he felt such an admonition was necessary because rumors were circulating through the institution that Mr. Newkirk and Mr. Lucas had been ordered back by the court, and that in the future no inmate could be transferred without first being brought up on charges.

In addition, regardless of any conversation that transpired between Mr. Newkirk and Mr. O'Mara, it is my intention as Superintendent of Wallkill Correctional Facility that Mr. Newkirk shall be treated fairly and shall not be subjected to any vindictive or retributive action as a consequence of his having been a party to this lawsuit.

Since Mr. Newkirk has been re-transferred to this institution and returned to his job, and since the release of Mr. Lucas on parole makes it apparent that the transfers from this institution in June, 1972 do not have an adverse effect on parole eligibility,* I respectfully submit that Mr. Newkirk's case should also be dismissed on the grounds that it is now moot and acadamic.

(Sworn to by Harold N. Butler on March 12, 1973.)

* Former plaintiffs Carl Oliver and David Rodriguez were also paroled subsequent to their June, 1972 transfer from Wallkill.

Affidavit of Daniel Pochoda, Esq., in Opposition to Motion to Dismiss on Grounds of Mootness, and Exhibits Annexed Thereto.

DANIEL POCHODA, being duly sworn, deposes and says that:

1. He is an attorney for plaintiffs in this action and makes this affidavit in opposition to defendants' motion to dismiss the entire complaint on the ground of mootness.

2. Shortly after the end of trial in this matter defendants, by their attorneys, stated that they would return plaintiffs Newkirk and Lucas to Wallkill. Further, after questioning, they agreed to completely expunge the files of any record of the transfer, and to restore plaintiffs in every respect to their situations prior to the transfer.

3. This information was conveyed by himself and Ms. Lynn Walker, Esq., to the plaintiffs. They were anxious to return to Wallkill and clear their records, but they were concerned about a number of other matters. Among other things, they felt that an order from this court was necessary to protect them in the future. They were worried about being summarily removed once again from Wallkill after their return, especially since they felt strongly that there was no legitimate reason in terms of their activities or the situation at Wallkill to transfer them in the first place.

4. Ms. Walker and himself [sic] agreed at plaintiffs' request to pursue these matters with defendants.

5. Discussion on these and other matters was begun with defendants, by their attorneys, in an effort to reach an acceptable agreement, taking into account the concerns of all parties, and settle the entire case. However, the oft-stated position of defendants was that they had done no

wrong in transferring plaintiffs, and, therefore, were not responsible for their dislocation or harsh experiences at the maximum security institutions. The offer to return plaintiffs to Wallkill was characterized as a magnanimous gesture on the part of defendant Butler, and not an acknowledgment that any illegal actions or even mistakes had been made. Defendants would not consider any type of promise, whether embodied in a stipulation or order, to the effect that persons would not be transferred for engaging in even legal and non-violent union activities, or more generally, that there would not be retaliation against persons exercising their constitutional rights at Wallkill.

6. As defendant Butler's affidavit in support of this motion reveals, defendants do promise to treat plaintiffs "fairly" in the future. This is not very reassuring, however, when taken with defendants' assertions that they acted fairly and reasonably in investigating and removing plaintiffs from Wallkill in the first place.

7. Defendants, by their attorneys, also refused to alter their transfer procedures in any manner. They consistently expressed the feeling that these summary transfers were necessary and proper, and, further, that to alter them would indicate that they had "lost" this case.

8. Defendants did indicate, by their attorneys, that a consent order, if it did not mention blame or wrongdoing, and did not alter future transfer procedures in any way, was a reasonable request, and that they envisioned "no problem" with signing one.

9. As can be seen from the attached letters it has become an unsurmountable problem. Even after the plaintiffs' proposed order, which was non-controversial to say the least, was altered at defendants' request, defendants changed their minds about signing.

Affidavit of Daniel Pochoda, Esq.

10. This proposed order was never meant as a settlement of the entire case, but rather was felt necessary in light of the reasonable concerns of plaintiffs, and to judge the good faith of defendants.

11. Besides the problem with the Order, the value placed by the plaintiffs on promises by defendants was reduced by other actions. For example, shortly after plaintiffs return to Wallkill, an attorney for defendants informed him that plaintiffs would not be removing from the files the records of the transfer, as had been promised. At a later date he was informed that a new entry to the files was made by defendant Butler without prior approval from the plaintiffs. Again this violated an agreement between the parties and did not alleviate plaintiffs' fears.

12. Even after the threat by Mr. O'Mara, which plaintiffs made known to Mr. Butler shortly it occurred, plaintiffs were not told by anyone at anytime that engaging in union activities would not subject them to transfer from Wallkill. This information comes from personal interviews with the plaintiffs.

13. In the past three months, he has received communications from four persons recently transferred from Wallkill to maximum security prisons. These persons state that the transfers were unreasonable and unnecessary, and came as a complete surprise to them. They attribute them to vindictiveness on the part of particular administrators at Wallkill, or because they actively demanded certain rights.

(Sworn to by Daniel Pochoda, April 10, 1973.)

Affidavit of James Newkirk, Annexed to Foregoing Affidavit.

JAMES NEWKIRK, being duly sworn, deposes and says:

1. He is a plaintiff in this action and makes this affidavit in opposition to defendant's motion to dismiss on the ground of mootness.

2. He felt that this lawsuit was necessary in the first place for a number of reasons and that most of these still exist today.

3. For example, he is still a member of the Inmate Labor Union at Wallkill and is interested in the continued functioning and legal recognition of this Union. However, since his return to Wallkill he has not spoken to other inmates or written to lawyers about this because of a fear of being transferred from Wallkill to a maximum security prison.

4. He believes that Mr. Butler is still very much opposed to the formation or even discussion of an Inmate Labor Union at Wallkill, and that he would take steps—including summary transfer as he did before—against persons promoting this idea.

5. In fact, shortly after his return to Wallkill, Assistant Superintendent O'Mara specifically threatened plaintiff Cornelius Lucas and himself with such a re-transfer. Mr. O'Mara stated that "it was a mistake" to even allow Mr. Lucas and himself back into Wallkill.

6. He is aware that defendant Butler has high regard for Mr. O'Mara, and often follows his recommendation—as he did when the initial decision to transfer plaintiffs was made.

Affidavit of James Newkirk, Annexed to Foregoing Affidavit.

7. The transfer procedures at Wallkill have remained the same, entirely unaffected by this lawsuit.

8. Thus, persons are still given no notice nor chance to explain prior to their removal, and are literally snatched up and shipped out.

9. In the past few months a number of such transfers have taken place. He was personally acquainted with a few of the men transferred, and in his estimation their behavior did not require such action.

10. He is aware that defendant Butler has not and it seems will not admit to any wrong doing in transferring Mr. Lucas and himself in the first place.

11. He believes that defendant Butler has not acted in good faith during the period since his return. For example, initially there was a promise to remove any mention of the transfer from his records, since it was felt that this could adversely affect his chances for parole, as well as for other Corrections Department programs. This promise was not kept. Then, a promise was made to send an explanatory letter to his file that met with his approval. This too, was not kept. Finally, an apparent agreement to sign a consent order which did not place any blame on any party and which he feels is necessary also fell through because of Mr. Butler's fear of being "stigmatized."

12. In light of all the above, he feels that an Order from this Court stating among other things that defendants Butler and Oswald were wrong to transfer Mr. Lucas and himself in the manner and for the reasons that they did, and directing them to adopt new transfer procedures and policies, is just as important and necesary now as ever.

(Sworn to by James Newkirk, April 9, 1973.)

Letter, Decenber 18, 1972, Annexed to Foregoing Affidavit.

LEGAL DEFENSE FUND

NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle, New York, N. Y. 10019 • 586-8397

December 18, 1972

Hillel Hoffman, Esq.
Assistant Attorney General
80 Centre Street
New York, New York

Re: *Newkirk* v. *Butler, 72 Civ. 2851*

Dear Mr. Hoffman,

Enclosed you will find a copy of the draft consent order. In view of the threats made against the plaintiffs by Officer O'Mara at Walkill, and in view of the fact that the plaintiffs have not been fully restored to their previous positions at Wallkill, we feel it is appropriate to have an order entered in this cas. We recognize that defendant Butler has not contributed to this situation and has acted in good faith, but his agents have necessitated this order to allay plaintiffs' fears of retaliation.

I trust that the draft will meet with your approval. I have endeavored to make it as neutral as possible. Take care and I lookforward to hearing from you before December 25, 1972. I shall advise the Court of the status of our negotiations.

Truly yours,

Lynn J. Walker
Lynn J. Walker
Dan Pochoda
Attorneys for the Plaintiffs

LW:irp
Enclosure

Consent Order, Annexed to Foregoing Affidavit.

72 Civ. 2851

JAMES NEWKIRK and CORNELIUS LUCAS,

Plaintiffs,

v.

HAROLD N. BUTLER, SUPERINTENDENT, WALLKILL CORRECTIONAL FACILITY, and RUSSELL G. OSWALD, COMMISSIONER OF CORRECTIONAL SERVICES OF THE STATE OF NEW YORK,

Defendants.

[DRAFT]

Plaintiffs are two New York State prisoners who were on June 8, 1972 transferred from the Wallkill Correctional Facility, a medium security institution in Wallkill, New York, to Clinton Correctional Facility, a maximum security institution in Dannemora, New York. Plaintiffs brought an action pursuant to 42 U.S.C. § 1983 to secure their retransfer claiming that their First, Sixth and Fourteenth Amendment rights had been violated. Trial commenced on November 27, 1972, and was concluded on November 29, 1972. Upon conclusion of the trial, the parties undertook to settle the case in pursuance of which plaintiffs were voluntarily by the defendants retransferred to the Wallkill Correctional Facility. Therefore, upon consideration of the representations of counsel for the respective parties that all parties agree that the following shall constitute a final determination of this matter of the merits, it is by this Court this day of December, 1972, ORDERED:

1. That plaintiffs, James Newkirk and Cornelius Lucas be retransferred to Wallkill Correctional Facility;

Consent Order, Annexed to Foregoing Affidavit.

2. That plaintiffs be fully restored to all rights and privileges previously enjoyed at Wallkill Correctional Facility, including, but not limited to, placement in their previous employment at the wage level they would have received had they not been transferred;
3. That the transfer not be considered as reflecting on plaintiffs suitability for release on parole or for participation in any other program which the defendants may supervise or direct;
4. That plaintiffs are not to be threatened or punished in any way by defendants and/or their agents for having undertaken the instant action.

Dated:

SO ORDERED:

.....
Robert J. Ward
United States District Judge

CONSENT:

.....
Hillel Hoffman, Assistant
Attorney General

Attorney for the Defendants

.....
Lynn Walker, Dan Pochoda

Attorneys for the Plaintiffs

Letter, December 19, 1972, Annexed to Foregoing Affidavit.

LEGAL DEFENSE FUND

NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle, New York, N.Y. 10019 • 586-8397

December 19, 1972

The Honorable Judge Robert J. Ward
The United States District Court
for the Southern District of New York
Foley Square
New York, New York

Re: *Newkirk* v. *Butler*, 72 Civ. 2851

Dear Judge Ward:

Dan Pochoda relayed the message to me that your Chambers wished to be advised of the status of our settlement negotiations. We are proceeding to agreement, but have not been able to do so as quickly as we would like because of the following matters: Assistant Attorney General Hoffman advised us that there is no way that mention of the transfers can be expunged from plaintiffs' records. We therefore agreed that a letter to the files from Superintendent Butler absolving plaintiffs from fault in the transfer would serve to mitigate any untoward effects which the transfer information might create. Two drafts of such a letter were prepared by Assistant Attorney General Hoffman. The first was unsatisfactory to us. The second might have sufficed with minor changes, but before all parties approved it, the letter was accidentally through a misunderstanding sent into the files by Superintendent Butler. Further, we have spoken with the plaintiffs and they have advised us of two distressing occurrences. First, they are not receiving the wages they

Letter, December 19, 1972, Annexed to Foregoing Affidavit.

would have received had they not been transferred. Second, upon return to Wallkill, the Assistant Deputy Superintendent O'Mara in effect threatened plaintiffs by telling them that it was a "mistake" to bring them back and "warned" them that they could be shipped out again. Needless to say, Mr. Lucas and Mr. Newkirk feel somewhat uncertain of their situation at Wallkill.

For the above reasons, Dan Pochoda and I are asking Assistant Attorney General Hoffman to enter into a consent order with us, your Honor being willing. I enclose a draft of the consent order which I have previously furnished Assistant Attorney General Hoffman. It casts no aspersions on the defendants, and I believe will serve to allay plaintiffs' fears. At present, we are awaiting Mr. Hoffman's comments.

All parties are acting in good faith and we are hopeful of a speedy resolution of the matter. We will notify the Court as soon as a final agreement is reached.

Thank you for being so attentive and courteous to us all at the trial. The plaintiffs truly felt that they received justice in your Honor's Courtroom. Best wishes for the holiday season.

Truly yours,

Lynn Walker
(Mrs.) Lynn Walker
Attorney for Plaintiffs

LW:irp
cc: Dan Pochoda, Esq.
Hillel Hoffman, Esq.
Mr. Cornelius Lucas
Mr. James Newkirk

Enclosures

Letter, January 4, 1973, Annexed to Foregoing Affidavit.

LEGAL DEFENSE FUND

NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle, New York, N.Y. 10019 • 586-8397

January 4, 1973

Mr. J. E. LaVallee
Superintendent
Clinton Correctional Facility
Dannemora, New York 12929

Re: Property of Mr. James Newkirk,
Mr. Cornelius Lucas

Dear Sir:

I am writing in behalf of my clients, Mr. James Newkirk and Mr. Cornelius Lucas, who, up until early December, were incarcerated at your facility. They were then transferred and are presently at Wallkill Correctional Facility. They have now advised me that they still have not received their personal property from Clinton. I can appreciate that with the holidays many matters may be delayed, but any consideration which you can give to the expedition of the return of their property will be greatly appreciated. Thank you in advance.

Truly yours,

Lynn Walker
(Mrs.) Lynn Walker
Associate Counsel

LW:irp
cc: Mr. Dan Pochoda
Mr. Hillel Hoffman
Mr. Harold N. Butler
Mr. Cornelius Lucas
Mr. James Newkirk

Letter, January 23, 1973, Annexed to Foregoing Affidavit.

LEGAL DEFENSE FUND

NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle, New York, N. Y. 10019 • 586-8397

January 23, 1973

Mr. Hillel Hoffman
Assistant Attorney General
80 Centre Street
New York, New York

Re: Consent Order, *Newkirk* v. *Butler*,
72 Civ. 2851

Dear Mr. Hoffman:

Enclosed please find a revised copy of the proposed consent order. I have changed it so as to reflect your suggestions and am hopeful that in its present form it is agreeable to us all.

Again, the order is not meant to in any way cast a shadow upon the good faith of any of the parties. Hope to hear from you soon.

Very truly yours,

(Mrs.) Lynn Walker
Associate Counsel

LW:irp
cc: Dan Pochoda, Esq.

Consent Order, Annexed to Foregoing Affidavit.

72 Civ. 2851

JAMES NEWKIRK and CORNELIUS LUCAS,
Plaintiffs,

v.

HAROLD N. BUTLER, Superintendent, Wallkill Correctional Facility, and RUSSELL G. OSWALD, Commissioner of Correctional Services of the State of New York,
Defendants.

Plaintiffs are two New York State prisoners who were on June 8, 1972 transferred from the Wallkill Correctional Facility, a medium security institution in Wallkill, New York, to Clinton Correctional Facility, a maximum security institution in Dannemora, New York. Plaintiffs brought an action pursuant to 42 U.S.C. § 1983 to secure their retransfer claiming that their First, Sixth and Fourteenth Amendment rights had been violated. Trial commenced on November 27, 1972, and was concluded on November 29, 1972. Upon conclusion of the trial, the parties undertook to settle the case in pursuance of which plaintiffs were voluntarily retransferred to the Wallkill Correctional Facility by the defendants. Plaintiffs are, as of this date, incarcerated at that facility. Therefore, upon consideration of the representations of counsel for the respective parties that all parties agree that the following shall constitute a final determination of this matter of the merits, it is by this Court this day of 1973

ORDERED:

1. That plaintiffs be fully restored to all rights and privileges previously enjoyed at Wallkill Correctional Facility, including, but not limited to, placement in their previous employment;

2. That the transfer not be considered as reflecting on plaintiffs suitability for release on parole or for participation in any other program which the defendants may supervise or direct; and

3. That plaintiffs are not to be threatened or punished in any way by defendants and/or their agents for having undertaken the instant action.

Dated:

SO ORDERED:

ROBERT J. WARD
United States District Judge

CONSENT:

.....
Hillel Hoffman, Assistant
Attorney General
80 Centre Street
New York, New York
Attorney for the Defendants

.....
Lynn Walker
NAACP Legal Defense and
Educational Fund, Inc.
10 Columbus Circle, Suite 2030
New York, New York 10019
Attorney for the Plaintiffs

Letter, February 14, 1973, Annexed to Foregoing Affidavit.

LEGAL DEFENSE FUND
NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle, New York, N.Y. 10019
586-8397

February 14, 1973

Hillel Hoffman, Esq.
Assistant Attorney General
80 Centre Street
New York, New York

Re: *Newkirk* v. *Butler*, 72 Civ. 2581

Dear Mr. Hoffman:

I have not heard from you definitely as to whether your clients will enter into the revised Consent Order which I forwarded to you on January 23, 1973. While I have from the first appreciated the sincerity of your efforts to expedite matters, this continued inaction seems unnecessary and is causing concern to me and to my clients. Please advise me by the week's end as to your intentions in this regard. I feel that an order is needed to protect my clients, and if a satisfactory order by agreement cannot be arrived at in the immediate future, I intend to request the entry of an order by the Honorable Judge Robert J. Ward.

Truly yours,

Lynn Walker
(Mrs.) Lynn Walker
Associate Counsel

LW:irp
cc: Mr. Cornelius Lucas
Mr. James Newkirk
Mr. Dan Pochoda

Letter, February 21, 1973, Annexed to Foregoing Affidavit.

LEGAL DEFENSE FUND
NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle, New York, N.Y. 10019
586-8397

February 21, 1973

The Honorable Judge Robert J. Ward
The United States District Court
for the Southern District of New York
Foley Square
New York, New York

Re: *Newkirk* v. *Butler*, 72 Civ. 2851

Dear Judge Ward:

This letter is to advise you as to the status of negotiations regarding settlement of the above-captioned case. Regrettably, the news is not entirely positive.

On December 18, 1972, after oral conversations with Assistant Attorney General Hillel Hoffman, who represents the defendants, I mailed to him a Draft Consent Order. (See enclosed copy marked Exhibit "1".) In those conversations he indicated that Superintendent Butler did not appear adverse to entering into such a suitable order. Subsequently, Mr. Hoffman and I talked again and he stated that Superintendent Butler felt that the Draft should be modified by exclusion of subparagraph 1 in which the retransfer of plaintiffs to Wallkill was ordered. I agreed to this request. Mr. Hoffman also told me that the Superintendent did not approve of that portion of subparagraph 2, which recited that plaintiffs were to receive

Letter, February 21, 1973, Annexed to Foregoing Affidavit.

the wages they would have received had they not been transferred. While I felt that this was a necessary portion of the Order, I nevertheless agreed to its excision upon Mr. Hoffman's assurances that plaintiffs would receive appropriate wages as soon as was feasible. On January 23, 1973, I mailed what I hoped would be the final Consent Order to Mr. Hoffman. (See enclosed copy marked Exhibit "2".) He advised me that he would forward same to Superintendent Butler. After substantial delay, I wrote to Mr. Hoffman on February 14, 1973, asking the reason why. (See enclosed copy marked Exhibit "3".) On February 16, 1973, Mr. Hoffman called and advised my secretary, Miss Ivalina Passe, that Superintendent Butler had determined not to enter into any Consent Order at all.

It now appears that Mr. Cornelius Lucas will be released later this month on parole so that an Order is not needed as to him. However, as I explained to the Court in my letter of December 19, 1972, I believe that some Order is still needed in this case. Your Honor may recall that Assistant Deputy Superintendent O'Mara in effect threatened plaintiffs upon their return to Wallkill by telling them that it was a "mistake" to bring them back and "warning" them that they could be shipped out again. Mr. Newkirk was rightfully intimidated by that remark and remains uncertain of his situation at Wallkill.

Mr. Dan Pochoda, Esq., and I respectfully request your Honor, therefore, to enter an Order in this case along the lines detailed in Exhibits 1 and 2 attached hereto. If your Honor please, I would be glad to draw up such an Order for your Honor and/or be anxious to meet with your Honor at your convenience to discuss this matter further. I can appreciate that this may seem an inconsequential request, but for my client, Mr. Newkirk's protection and ease of

Letter, February 21, 1973, Annexed to Foregoing Affidavit.

mind, it is nevertheless a vital one. Thank you very much in advance for your consideration of this letter.

Very truly yours,

LYNN WALKER
(Mrs.) Lynn Walker
(Mr.) Dan Pochoda
Attorneys for the Plaintiffs

LW:irp
cc: Mr. Hillel Hoffman
Mr. Dan Pochoda
Mr. James Newkirk
Mr. Cornelius Lucas

Letter, February 23, 1973, Annexed to Foregoing Affidavit.

(Emblem)

STATE OF NEW YORK
DEPARTMENT OF LAW
State Office Building
80 Centre Street
New York, N. Y. 10013
Telephone: 488-3289

LOUIS J. LEFKOWITZ
Attorney General

February 23, 1973

Re: Newkirk v. Butler
72 Civ. 2851

Hon. Robert J. Ward
United States District Court
United States Court House
Foley Square
New York, New York 10007

Dear Judge Ward:

I am writing this letter in response to Mrs. Walker's letter of February 21, 1973.

As Mrs. Walker's letter indicates, Cornelius Lucas will soon be released on parole, and an order will not be necessary as to him. I would further suggest that the release of Lucas on parole will render his case academic since no damages have been requested on his behalf, and I intend to move to dismiss his case on this ground in the near future.

With regard to plaintiff Newkirk, we strongly object to any order being entered on his behalf. Mr. Newkirk was

Letter, February 23, 1973, Annexed to Foregoing Affidavit.

returned to Wallkill Correctional Facility by Mr. Butler almost immediately after the trial was concluded, and he has since been returned to his truck driving job. We believe that Mr. Butler acted in good faith in restoring Mr. Newkirk to his former assignment, and should not be stigmatized by being forced to enter into a consent decree, or by being ordered to do what he has already done.

Mr. Butler is not personally responsible for any purported threats made by Mr. O'Mara, and should any difficulties arise in the future, counsel may make further application to the court if it appears that Mr. Newkirk is being threatened or punished for having undertaken the instant action. In the meanwhile, there does not appear to have been any serious problems with Mr. Newkirk at Wallkill during the past three months, and it is my intention to move to dismiss his case in conjunction with Mr. Lucas' case, on the grounds that it too is academic.

The defendants also wish to express their appreciation to Your Honor for the extremely fair trial that was conducted in this case.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

By HILLEL HOFFMAN
HILLEL HOFFMAN
Assistant Attorney General

HH:kp

cc: Mrs. Lynn Walker
Mr. Daniel Pachoda

Letter, February 27, 1973, Annexed to Foregoing Affidavit.

LEGAL DEFENSE FUND
NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle, New York, N.Y. 10019
586-8397

February 27, 1973

The Honorable Judge Robert J. Ward
The United States District Court
The United States Courthouse
Foley Square
New York, New York 10007

Re: *Newkirk* v. *Butler*, 72 Civ. 2851

Dear Judge Ward:

I feel that it is necessary to respond to Mr. Hoffman's letter of February 23, 1973. Frankly, I am surprised at the lack of good faith which the letter evidences. As I advised the Court previously, for months now Mr. Hoffman has represented to me that his clients would not oppose a consent order. Now he proposes to move to dismiss the action.

I think that it is highly unnecessary for any such motion to be filed. What we need is a settlement order. Unless Mr. Hoffman is by implication refusing to settle this case, I can see no reason why such an order should not be entered. However, in the event that any motion to dismiss is filed, it is our intention to oppose it and to petition the court for a protective order along the lines sought earlier in this litigation. It is disingenuous, indeed, for Mr. Hoffman to assert that Superintendent Butler "is not personally responsible for any purported threats made by Mr. O'Mara," his agent. If this is the case, an order by

Letter, February 27, 1973, Annexed to Foregoing Affidavit.

this Court assigning responsibility to Superintendent Butler to direct his agents not to harass Mr. Newkirk, who remains at Wallkill, is certainly advisable.

Moreover, Mr. Lucas has not been made whole by the Department of Corrections. I enclose copies of correspondence between Mr. Lucas, Superintendent Butler and Superintendent LaVallee at Clinton Correctional Facility, the transferee institution, which indicates that items of personal property valued at approximatelly $63.00 by Mr. Lucas, and lawfully in his possession at Wallkill, were seized from him at Clinton as "contraband" and never returned. But for the transfer, Mr. Lucas, a man of humble means, would not have lost these items. Certainly any good faith on the part of Mr. Hoffman and Superintendent Butler would dictate that Mr. Lucas be given his property back or be compensated for its loss. At this late date, my clients and I are deeply dismayed by the defendants' actions. Some protection is needed by Mr. Newkirk lest the agents for whose acts Superintendent Butler disclaims responsibility feel free to subject Mr. Newkirk to further threats and harassment at will.

Thank you.

Very truly yours,

Lynn Walker
(Mrs.) Lynn Walker
(Mr.) Dan Pochoda

Attorneys for the Plaintiffs

LW:irp
cc: Mr. James Newkirk
Mr. Cornelius Lucas
Assistant Attorney General
Hillel Hoffman

Letter, March 2, 1973, Annexed to Foregoing Affidavit.

(Emblem)

State of New York
DEPARTMENT OF LAW
State Office Building
80 Centre Street
New York, N.Y. 10013
Telephone: 488-3289

March 2, 1973

Louis J. Lefkowitz
Attorney General

Re: Newkirk v. Butler

Hon. Robert J. Ward
United States District Judge
United States Court House
Foley Square
New York, New York 10007

Dear Judge Ward:

I am advised by the Clerk's Office at Wallkill Correctional Facility that Cornelius Lucas was released on parole on February 22, 1973. With regard to the items of property that he claims were seized from him at Clinton Correctional Facility, I was not aware from any previous conversation or correspondence that this difficulty had arisen. However, in answer to Mrs. Walker's statement in her February 27, 1973 letter, that "any good faith on the part of Mr. Hoffman and Superintendent Butler would dictate that Mr. Lucas be given his property back or be compensated for its loss," I wish to call Your Honor's attention to the efforts made on Mr. Lucas' behalf by Superintendent Butler, as indicated by the correspondence

Letter, March 2, 1973, Annexed to Foregoing Affidavit.

annexed to Mrs. Walker's letter. I would also call Your Honor's attention to the fact that I personally made telephone calls to Clinton Correctional Facility to expedite the shipment of Lucas' and Newkirk's property after their re-transfer, which had been delayed because Clinton had only one vehicle for such purposes. Whatever property was lost either as a result of Lucas' re-transfer or as a result of a shakedown at Clinton on October 16, 1973 was not the fault of Superintendent Butler, and raises a new dispute between Mr. Lucas and the staff at Clinton. Hopefully, this matter may be resolved amicably, but it does not relate directly to the claims against Superintendent Butler, which dealt with the legality of plaintiffs' transfer from Wallkill and its effect on plaintiffs' institutional records.

With regard to any alleged statements made by Deputy Superintendent O'Mara to plaintiffs, we wish to emphasize that Mr. O'Mara is not an "agent" of Mr. Butler, because Mr. O'Mara is an employee of the State of New York, who was appointed from a civil service list, and is not an employee of Mr. Butler. Mr. O'Mara is not a defendant in this action, and whatever statements he may have made to plaintiffs cannot be attributable to Superintendent Butler, who has acted in good faith, and did not authorize any such statements. Furthermore, I am advised that Mr. Newkirk was returned to his truck driving assignment on December 18, 1972, and has not been the subject of any disciplinary charges since that time, which would seem to indicate that things have been running smoothly.

Finally, with regard to Mrs. Walker's contention that we have not acted in good faith in changing our position about signing a consent order, I would submit that our willingness to return both plaintiffs to their assignments at Wallkill as soon as the trial was completed, represented an act of good faith which we were under no obligation to perform. While

Letter, March 2, 1973, Annexed to Foregoing Affidavit.

I did represent to Mrs. Walker initially that Mr. Butler would consider signing a consent order along certain modified lines, Mr. Butler subsequently changed his mind after examining plaintiffs' proposed drafts, because he believed that such an order would jeopardize his authority at Wallkill, and would stigmatize him as having lost the case. Undoubtedly, Mr. Butler was influenced by the fact that in January, Mr. Lucas had been granted an open parole date by the Board of Parole, and that in December, Mr. Newkirk had returned to his truck driving assignment and seemed satisfied.

Under these circumstances we reiterate our opposition to any order being entered against the defendants, and we respectfully urge this Court to consider our motion to dismiss the case, which will be filed in the near future, as soon as the necessary paperwork can be transmitted between Mr. Butler and our office.

Respectfully yours,

LOUIS J. LEFKOWITZ
Attorney General

By Hillel Hoffman
HILLEL HOFFMAN
Assistant Attorney General

HHH:jc

cc: Mrs. Lynn Walker, Esq.
Legal Defense Fund
10 Columbus Circle
New York, New York 10019

Daniel Pachoda, Esq.
Legal Aid Society
119 Fifth Avenue
New York, New York 10003

Reply Affidavit of Hillel Hoffman, Esq., in Support of Motion to Dismiss on Grounds of Mootness and Exhibits Annexed Thereto.

HILLEL HOFFMAN, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants. I submit this affidavit in reply to certain statements contained in the affidavit of Daniel Pachoda, dated April 10, 1973, filed in opposition to defendants' motion to dismiss; and in reply to other arguments made in plaintiffs' affidavits and briefs.

In paragraph # 2 of his affidavit Mr. Pachoda states that the defendants "agreed to completely expunge the files of any record of the transfer, and to restore plaintiffs in every respect to their situations prior to the transfer." To the best of my recollection no such agreement was made by the defendants because the Correction Department could not alter its records to the extent of denying the existence of the transfer completely. Rather what the defendants did agree to do was to place a new memorandum in plaintiffs' files which would explain the reasons for the transfers in non-prejudicial terms, and would replace the previous memoranda that had been put in the files at the time of the transfer, and challenged by plaintiffs at trial.

To this end I drafted a memorandum from Superintendent Butler to Commissioner Oswald, and forwarded a copy to Mr. Pachoda for his approval. Mr. Pachoda voiced certain objections to this first draft, and I redrafted it without the material which Mr. Pachoda considered prejudicial. I then read the revised memorandum over the phone to Mr. Pachoda, and he indicated to me that he had no objection to it. During this conversation Mr. Pachoda said nothing about having to consult with plaintiffs before this revised memorandum could be placed in their files. Accordingly, I assumed from our conversation that the memorandum was

acceptable, and I advised Superintendent Butler to place it in plaintiffs' files, and to remove the previously challenged memoranda.

This was done by Superintendent Butler on December 14, 1972, and his letter to me and the accompanying memorandum are annexed hereto as defendants' exhibit 1. In so far as Mr. Pachoda now asserts in paragraph "11" of his affidavit that the placement of the revised memorandum in plaintiffs' files without the prior approval of plaintiffs "violated an agreement between the parties," this is false, to the best of my recollection. Indeed, the fact that a misunderstanding had occurred is evidenced by a letter from Mrs. Walker to the Court, dated December 19, 1972, which states as follows:

> "We are proceeding to agreement, but have not been able to do so as quickly as we would like because of the following matters: Assistant Attorney General Hoffman advised us that there is no way that mention of the transfers can be expunged from plaintiffs' records *We therefore agreed* that a letter to the files from Superintendent Butler absolving plaintiffs from fault in the transfer would serve to mitigate any untoward effects which the transfer information might create. Two drafts of such a letter were prepared by Assistant Attorney General Hoffman. The first was unsatisfactory to us. The second might have sufficed with minor changes, but before all parties approved it, the letter was *accidentally through a misunderstanding* sent into the files by Superintendent Butler." (letter of Mrs. Walker, dated December 19, 1972, annexed hereto as defendants' exhibit 2) (emphasis added).

Thus, what plaintiffs' counsel once characterized as an accidental misunderstanding, has now been transformed into a broken agreement by the defendants.

With regard to the signing of a consent order, this matter also needs full elucidation before a decision can be reached on the sincerity of the parties. A consent order was first proposed to me by plaintiffs' attorneys during the middle of December, 1972. At that time I was more sympathetic to such an order because plaintiff Newkirk had not yet been returned to his truck driving job, plaintiff Lucas had not yet met with the parole board, both plaintiffs had apparently not received their property from Clinton Correctional Facility, and both plaintiffs claimed that Deputy Superintendent O'Mara had threatened them upon their return to Wallkill. Under these circumstances I agreed to pursue the matter, and a first draft was sent to me by Mrs. Walker on December 18, 1972, and I forwarded it to Superintendent Butler.

On January 4, 1973, Superintendent Butler wrote to me that he would agree to paragraphs three and four of the proposed order, but that he would not argee to paragraphs one and two. Subsequently I conveyed these objections to Mr. Walker, and she sent me a revised draft on January 23, 1973, which I forwarded to Superintendent Butler on January 26, 1973.

In the interim however, certain events had occurred which made Mr. Butler believe that it would no longer be advisable to enter into a consent agreement. First, Cornelius Lucas had received a release date from the Board of Parole, which meant that he would no longer be under Mr. Butler's supervision or control. Secondly, James Newkirk had since been returned to his truck driving assignment and seemed to be satisfied, which eliminated the need for an order restoring him to his previous employment. In addition, there had been no incidents involving Newkirk during the two months since his return to Wallkill, notwithstanding the purported "threat" from Deputy Superintendent O'Mara.

Under these circumstances Mr. Butler believed that entering into a consent order would be a bad precedent, and he communicated his objections to me on February 8, 1973. On February 16, 1973 I advised Mrs. Walker's secretary that we were no longer willing to sign a consent order, and that under the changed circumstances of the case, we would move to dismiss the complaints. In view of Lucas' release on parole and Newkirk's restoration to his truck driving job, we submit that the refusal of Superintendent Butler to agree to a consent order is entirely understandable and reasonable.

In their affidavits and memorandum of law, plaintiffs also make much of the fact that defendants are unwilling to concede that they acted illegally in transferring Lucas and Newkirk to other institutions. This is a curious assertion by plaintiffs when it is considered that there are no cases in this Circuit, and barely any cases in any other Circuit, which hold that an inmate who is transferred from one institution to another, without loss of good time or the imposition of substantial discipline, is entitled to a full due process hearing. Indeed, as we pointed out in in our pretrial memorandum of law, the overwhelming number of cases that have dealt with the transfer issue have recognized the authority of prison officials to transfer inmates without due process hearings, absent the imposition of additional penalties. Significantly, plaintiffs have cited no cases in support of their often repeated assertion that the defendants have acted illegally.

What is apparent from plaintiffs' affidavits and briefs is that they are attempting to utilize this case as a vehicle for reforming the transfer procedures for at least all Wallkill inmates, although the instant case is not a class action, and the evidence at trial pertained to Newkirk and Lucas. Plaintiffs' assertions about unnamed inmates who have been transferred at unspecified times, should not be the basis of this Court issuing unprecedented declaratory and

injunctive relief, particularly where a full trial on the merit has already been concluded.

Finally, plaintiffs also complain of alleged adverse consequences arising in the future from the transfers at issue. This assertion is almost entirely undermined by the fact that four of the five inmates who were transferred on June 8, 1972 have since been released on parole (Oliver, Rosario, Rodriquez and Lucas). While the defendant Superintendent and Commissioner cannot guarantee plaintiff Newkirk's release on parole when he meets the Parole Board for the first time in July, 1975, it is apparent from the disposition in four similar cases that the June 8th transfers have not had any prejudicial effect on parole eligibility.

Furthermore, the memorandum which Superintendent Butler placed in Newkirk's file specifically states that the transfer was administrative rather than disciplinary in nature, and that it should have no bearing in any future determinations made by the Parole Board or the time allowance committee. As we noted before, this memorandum was placed in plaintiff's file with the good faith understanding that it was acceptable to plaintiff's counsel.

Lastly, it is significant that apart from one purported threat by Deputy Superintendent O'Mara to Newkirk immediately upon Newkirk's arrival at Wallkill, there has not been a single incident in the four months since Newkirk has been returned to that institution, in which he claims that he was harassed or treated unfairly by any member of the staff. This absence of any mistreatment, in addition to Mr. Butler's sworn statement that Newkirk will be treated fairly and not subjected to retaliation for having participated in this lawsuit, clearly obviates the need for any order to be entered on Newkirk's behalf.

WHEREFORE, defendants' motion to dismiss the complaint on the ground of mootness should be granted in all respects.

(Sworn to by Hillel Hoffman, April 11, 1973.)

Exhibit 1.

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES
WALLKILL CORRECTIONAL FACILITY
WALLKILL, NEW YORK 12589

(EMBLEM)

HAROLD N. BUTLER
SUPERINTENDENT

IN REPLYING
PLEASE REFER TO

December 14, 1972

RE: Cornelius Lucas—Wk#9659
James Newkirk, Jr.—Wk#9704

Mr. Hillel Hoffman
Assistant Attorney General
Department of Law
80 Centre Street
New York, New York 10013

Dear Mr. Hoffman:

This is to advise that I have this date signed the Memorandum which you forwarded to me relative to the above named inmates, and I am placing copy in their files. We will remove the previous Memorandums relative to their transfer to Clinton, as you suggested, from their Central, Service Unit and Parole files, and hold them separately.

Dan Pachoda did visit Wallkill yesterday, and asked for me but I was in Albany. He just telephoned. There seems to be no serious problem. The inmates were concerned about Mr. O'Mara's initial talk with them after their return. However, I think that they now understand that he was indicating that they would receive the same treatment as any other inmate confined here.

Exhibit 1.

I am forwarding copies of the new Memorandum to Commissioner Oswald for filing in their Albany folders, and requesting removal of the previous ones.

I certainly appreciate your assistance.

Sincerely,

HAROLD N. BUTLER
Harold N. Butler
Superintendent

CC—copy of signed Memorandum

Exhibit 1.

MEMORANDUM

TO: RUSSELL G. OSWALD
Commissioner of Correctional Services

FROM: HAROLD N. BUTLER
Superintendent
Wallkill Correctional Facility

Re: (James Newkirk) (Cornelius Lucas)

As you know, during the first week of June, 1972 there was a state of unrest at this facility due to animosity between members of the inmate liason committee and inmates who were active on behalf of an inmate labor union. As you are further aware, it was necessary to transfer five inmates to other correctional facilities on June 8, 1972 in order to prevent any harm from coming to them and to other inmates and personnel. Among the inmates transferred was the above named inmate who went to Clinton Correctional Facility. At the present time the situation at Wallkill has been quieted and I believe it would be appropriate to restore this inmate to our program.

As you know this transfer was entirely administrative in nature, and was not accompanied by disciplinary charges or intended as a disciplinary action. This transfer should have no bearing in any future determinations made by the Board of Parole or the time allowance committee.

Respectfully submitted,

HAROLD N. BUTLER
HAROLD N. BUTLER
Superintendent

cc: Parole

December 14, 1972

Exhibit 2.

LEGAL DEFENSE FUND NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
10 Columbus Circle,
New York N. Y. 10019 • 586 8397

December 19, 1972

The Honorable Judge Robert J. Ward
The United States District Court
for the Southern District of New York
Foley Square
New York, New York

Re: *Newkirk* v. *Butler*, 72 Civ. 2851

Dear Judge Ward:

Dan Pochoda relayed the message to me that your Chambers wished to be advised of the status of our settlement negotiations. We are proceeding to agreement, but have not been able to do so as quickly as we would like because of the following matters: Assistant Attorney General Hoffman advised us that there is no way that mention of the transfers can be expunged from plaintiffs' records. We therefore agreed that a letter to the files from Superintendent Butler absolving plaintiffs from fault in the transfer would serve to mitigate any untoward effects which the transfer information might create. Two drafts of such a letter were prepared by Assistant Attorney General Hoffman. The first was unsatisfactory to us. The second might have sufficed with minor changes, but before all parties approved it, the letter was accidentally through a misunderstanding sent into the files by Superintendent Butler. Further, we have spoken with the plaintiffs and they have advised us of two distressing occurrences. First, they are not receiving the wages they would

Exhibit 2.

have received had they not been transferred. Second, upon return to Wallkill, the Assistant Deputy Superintendent O'Mara in effect threatened plaintiffs by telling them that it was a "mistake" to bring them back and "warned" them that they could be shipped out again. Needless to say, Mr. Lucas and Mr. Newkirk feel somwehat uncertain of their situation at Wallkill.

For the above reasons, Dan Pochoda and I are asking Assistant Attorney General Hoffman to enter into a consent order with us, your Honor being willing. I enclose a draft of the consent order which I have previously furnished Assistant Attorney General Hoffman. It casts no aspersions on the defendants, and I believe will serve to allay plaintiffs' fears. At present, we are awaiting Mr. Hoffman's comments.

All parties are acting in good faith, and we are hopeful of a speedy resolution of the matter. We will notify the Court as soon as a final agreement is reached.

Thank you for being so attentive and courteous to us all at the trial. The plaintiffs truly felt that they received justice in your Honor's Courtroom. Best wishes for the holiday season.

Truly yours,

LYNN WALKER
(Mrs.) Lynn Walker
Attorney for Plaintiffs

LW:irp
cc: Dan Pochoda, Esq.
Hillel Hoffman, Esq.
Mr. Cornelius Lucas
Mr. James Newkirk

Enclosures

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 74-107

PETER PREISER, Commissioner of Correctional Services of New York State, and HAROLD BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

-against-

JAMES NEWKIRK,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, James Newkirk, who is now held in a New York State prison, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The respondent's affidavit in support of this motion is attached hereto.

WILLIAM E. HELLERSTEIN
DANIEL POCHODA
MARJORIE M. SMITH
Attorney for Respondent
The Legal Aid Society
Prisoners' Rights Project
15 Park Row
New York, New York 10038
[212] 374-1737

SUPREME COURT OF THE UNITED STATES

- -x

PETER PREISER, Commissioner of Correctional Services of New York State, and HAROLD BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

-against-

JAMES NEWKIRK

Respondent.

NO. 74-107

AFFIDAVIT

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF SULLIVAN)

JAMES NEWKIRK, being duly sworn, deposes and says:

I am the respondent in the above-captioned case, and I make this affidavit in support of the attached motion to proceed in forma pauperis.

I am unable because of my indigence to pay the costs of this case or to post security therefor.

I believe in good faith that I am entitled to the relief that I am seeking in this case.

WHEREFORE, I respectfully pray that the requested relief be granted.

James Newkirk
JAMES NEWKIRK

Sworn to before me this
9th day of September, 1974

Lois A. Stamatedes
NOTARY PUBLIC

LOIS A. STAMATEDES
Notary Public, State of New York
Residing in Ulster County
Commission Expires March 30, 1975

RECEIVED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-107

PETER PREISER, Commissioner of Correctional Services of New York State, and HAROLD BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

-against-

JAMES NEWKIRK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM E. HELLERSTEIN
Legal Aid Society
Prisoners Rights Project
15 Park Row
New York, New York 10038
212- 374-1737

OF COUNSEL:

DANIEL POCHODA
MARJORIE M. SMITH

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-107

PETER PREISER, Commissioner of Correctional Services of New York State, and HAROLD BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

-against-

JAMES NEWKIRK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a prison inmate whose transfer from a medium to maximun security penitentiary for alleged misconduct substantially alters the nature and conditions of his confinement is entitled, as a matter of due process, to notice and the right to be heard. -/-

Statement of the Case

In July, 1972 this action was commenced in the District Court by respondent and three other plaintiffs. The complaint alleged that plaintiffs were transferred by petitioners from Wallkill, a medium security institution, to various maximum security institutions without notice of charges and an opportunity to be heard, in violation of their rights under the Fourteenth Amendment, and prayed for declaratory and injunctive relief.

The District Court heard extensive testimony from plaintiffs James Newkirk and Cornelius Lucas,* and two other witnesses on their behalf. The court also heard testimony from petitioner Harold Butler and from Walter Dunbar, a former Executive Deputy Commissioner of Correctional Services. Depositions of various officials at Wallkill, and of one inmate, Warren Barnes, were also made a part of the trial record.

Witnesses appearing for both sides attested to the substantial differences between Wallkill and Clinton Correctional Facility, the maximun security institution to which respondent was transferred. It was established that at Wallkill inmates live in rooms rather than barred cells, move freely about unaccompanied by prison guards, and are afforded extensive periods of free time in which to pursue whatever activities they wish. It was further established that at Wallkill inmates have access to numerous recreational and rehabilitative programs not available at a maximum security facility such as Clinton.

* Prior to the trial, plaintiffs Carl Oliver and David Rodriguez were paroled and their cases were dismissed as moot.

While at Wallkill, respondent was able to pursue his interests in auto mechanics and truck driving, music, and art-work. However, at Clinton, he was unable to continue these activities.* Since Clinton is located much further from New York City than Wallkill, respondent's family was unable to visit him following his transfer. He was no longer permitted to telephone them, a privlege afforded at Wallkill. Additionally, respondent was placed in "idle" status in segregation upon arrival at Clinton and thus deprived of the wages he had been earning at Wallkill.

Respondent was transferred from Wallkill because the Superintendent decided that he was a leading proponent of an inmate labor union at Wallkill. This decision was based on nothing more than third-hand reports from correction officers who had not personally observed respondent's conduct.** In fact, respondent's role in supporting the inmate union was limited to signing an authorization form on June 2, 1972 and passing it on to another inmate. The inaccuracy of the reports the Superintendent received was indicated by his admission that an investigation concerning one inmate conducted after the transfers revealed that he was significantly less involved in the union effort than had been thought originally ; petitioner conceded that had this been known earlier, this man might not have been transferred.

Respondent was transferred from Wallkill on June 8, 1972 without warning, and without receiving any explanation for the transfer. The transfer came as a complete surprise, since

* Because of Wallkill's unique features, admission to that facility is achieved only after a prisoner has spent time at a maximum security facility and been screened for suitability to the Wallkill program. Respondent first applied to Wallkill in 1965, but was not accepted until 1971.

** Petitioner Butler stated that he transferred those inmates he had been informed were causing unrest at the prison by their continued advocy of the union on June 5th and 6th. However, the report he relied upon simply listed inmates allegedly active in circulating the union forms on June 2nd and 3rd.

up until the day it occurred respondent had been participating fully in Wallkill programs and had never been told that his behavior was in any way objectionable.

At the close of the trial, respondent and his remaining co-plaintiff were returned to Wallkill, and the parties discussed and tentatively agreed upon a consent order to settle the case. However, petitioners ultimately declined to sign a consent judgment, having concluded that any such order would "stigmatize" petitioner Butler, and moved instead to dismiss respondent's case as moot.* Respondent urged the court to grant the requested declaratory and injunctive relief since petitioners refused to alter their transfer practices at Wallkill.

On October 9, 1973, the District Court rendered its decision (Appendix C). It held that respondent's transfer from Wallkill violated his rights under the Due Process Clause both because he was not afforded notice of the transfer and an opportunity to be heard, and because he was never informed that his conduct might result in transfer.** The declaratory judgment entered by the District Court on October 26, 1973 decreed that respondent could not be transferred in response to his activity without being afforded a hearing at which he would be given notice of the charges and an opportunity to be heard, that he was entitled to have no adverse action taken against him because of his transfer from Wallkill, and that he was entitled to know what behavior was permissible at Wallkill and the circumstances which in petitioners'

---

*Respondent agreed to the dismissal of Lucas' case since he had been paroled on February 22, 1973.

**The Court stated that where compelling reasons for immediate transfer existed, the required hearing could be held following the transfer. However, it found that on the date of respondent's transfer there was no "clear and present danger" at Wallkill which justified his transfer without warning.

opinion would warrant his transfer to another prison.*

Petitioners appealed the district court's decision and judgment. On June 3, 1974 the court of appeals rendered a decision affirming that portion of the District Court's decision and judgment which held that respondent was entitled to minimal due process before being transferred from a medium to a maximum security institution.**

---

*After judgment had been entered, petitioners asked the district court to resettle its order to avoid any misconception that it applied to other than "disciplinary" transfers. The Court denied the request, stating that the judgment was sufficiently clear and narrowly drawn.

**The court of appeals reversed the district court's requirement that respondent was entitled to know in advance all the acts that would lead to a transfer partially on the ground that such a requirement could be complied with only through the use of "vague and meaningless generalities". (Appendix, 21).

ARGUMENT

In urging the Court to grant certiorari in this case, petitioners have vastly exaggerated its scope. The question involved in this case is not whether "the Due Process Clause applies to every loss of privilege and every deprivation that is suffered by a prison inmate" or whether every federal and state prisoner transferred from one prison to another should receive some formof due process.(Petition, 13, 18). Nor,finally, is it whether correction officials should be permitted to transfer inmates to prevent assaults, to implement classification decisions, or to respond to budgetary or staffing constraints. (Petition, 13, 15-17). Rather, the issue is simply whether a prisoner whose transfer from a medium to a maximum security institution for alleged misconduct substantially alters the conditions of his confinement is entitled to notice and an opportunity to be heard. On this issue the decision of the court of appeals was clearly correct, and there is no conflict among the lower federal courts. Manifestly, there is no important question of federal law requiring decision by this Court.

I

THE DECISION BELOW IS CLEARLY CORRECT AND THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

A. Based upon a detailed examination of the changes in respondent's living situation resulting from his transfer, the district court found that respondent had suffered a substantial loss and therefore should have been afforded minimal due process. The Court's conclusion was based on its finding that there was a striking contrast between conditions at Wallkill and at the maximum security prison to which respondent was transferred.* The record showed that at Wallkill inmates live in rooms rather than barred cells, move freely about unaccompanied by prison guards and are afforded extensive periods of free time. At Clinton, cells are locked, movement is restricted and recreational and rehabilitation programs much less extensive and accessible. Moreover, respondent was not able to receive visits from his family at Clinton since that prison is much further from New York City where they live. Additionally, respondent was segregated upon his arrival at Clinton and deprived of the opportunity to work or earn wages for a period of time.**

---

*Far from being "vague and unworkable" (Petition, 19) the classification levels relied upon by the courts in the instant case are reflected in state law (N.Y. Corr. L. sec. 70; 7 N.Y.C.R.R. sec. 100.30).

**This brief description makes clear that the courts below did not focus only on respondent's loss of job and training opportunities and the distance involved in his transfer (Petition, 19) but instead looked at the totality of changes in his living situation. Additionally, petitioners have no factual basis for their assertion that the harm caused respondent by this transfer was no greater than that occasioned by his previous transfers from one maximum security prison to another.

While petitioners have never questioned these factual findings of the district court, they have maintained that due process protections should be required only when a transfer is imposed "solely as a disciplinary punishment in response to an act of misconduct", and not when it is "administrative." (Appendix, 26). This position was considered sophistry by the courts below, since it gives insufficient weight "to the very real loss that an inmate may suffer even when his transfer is not part of formal disciplinary proceedings ... " (Appendix, 26). Moreover, it was recognized that it would be paradoxical to require some form of due process prior to a substantial deprivation of benefits and privileges within a prison and yet permit prison officials to impose significant deprivations by means of a transfer without affording the prisoner any due process. (Appendix, 28).

The need for a rational fact-finding process which gives the inmate some opportunity to correct mistaken impressions is particularly obvious in the circumstances of this case. As the court of appeals pointed out, a hearing might well have demonstrated that respondent "was but a passive pawn in a larger power struggle..." (Appendix, 29). Moreover, the Superintendent himself admitted that one prisoner had been transferred in error (an investigation concerning this inmate conducted after the transfers took place revealed that he was significantly less involved in the union than had been originally thought).

After arguing that the decisions of the court below are overly broad since they apply to "administrative" as well as "disciplinary" transfers, in the next breath petitioners attack the courts' decision for having failed to resolve all the"complex issues of penal administration" implicated in this case. (Petition, 17). While it is true that in accordance with respected judicial principles the court of appeals decided

only those issues presented to it, nothing in the court's decision interferes with the valid correctional considerations and goals referred to by petitioners. (Petition, 15-17). Rather than being unconcerned about prison security, the court expressly approved the portion of the district court's order allowing postponement of the required hearing where compelling reason for immediate transfer exists.* (Appendix, 29-30). Moreover, the district court explicitly recognized that some transfers from Wallkill have no disciplinary overtones and therefore need not be accompanied by due process (Appendix, 42). Nothing in the decisions below would inhibit the transfer of inmates due to budget or staffing constraints, nor do they bear upon the correction department's initial decision to choose or reject an inmate for Wallkill.

B. Despite petitioners' claim that there is an important federal question "at the heart of this case" (Petition, 18) we have seen that this case in reality concerns only whether a prisoner transferred from a medium to a maximum security prison should be afforded minimal due process. The decision of the courts below that he should is consistent, both in its reasoning and in its conclusion, with this Court's recent decision in Wolff v. McDonnell, 42 U.S.L. Week

*Petitioners' interest in protecting inmates from reckless exposure to assaults by fellow inmates (Petition, 15-16) is if anything furthered by the court's decision, since reliable fact-finding procedures increase the probability that the inmate who is in fact assaultive will be transferred.

5190 (June 24, 1974) and therefore presents no important federal question.*

In Wolff, both the loss of good time and disciplinary segregation were recognized as major changes in the conditions of an inmate's confinement, requiring due process safeguards. Id. at 5200, fn. 19. In the instant case, the courts below found that when respondent was moved from a medium to a maximum security prison, he suffered a major change in the conditions of his confinement, and was therefore entitled to some measure of due process.** Moreover, the procedural safeguards afforded respondent (notice and an opportunity to be heard) are minimal and similar to those mandated in Wolff. Contrast, Gomes v. Travisono, 490 F. 2d 1209 (1st Cir. 1973), vacated and remanded, ___U.S.___ (July 8, 1974).***

---

*As a factual matter, in the eighteen months preceding trial, only eighteen inmates were transferred from Wallkill on grounds of alleged unsuitability. Contrast, Wolff v. McDonnell, supra, 42 U.S.L. Week at 5201 ("During 1973, the Federal Government alone conducted 19,000 misconduct hearings....").

**Since the instant case was decided before this Court's decision in Wolff, the opinion did not employ its precise terminology. However, the court of appeals clearly engaged in the type of factual analysis referred to approvingly in Wolff before concluding that respondent's loss was sufficient to entitle him to due process.

**Petitioners' apparent uncertainty about what elements of due process they must afford transferees (Petition, 18) manifestly presents no important federal question. Even if petitioners are in doubt about the application of Wolff to the instant case, their request for clarification is more appropriately addressed to the court of appeals than to this Court.

II.

THERE IS NO CONFLICT OF DECISION

Finally, while petitioners have cited a number of lower federal court decisions involving the general subject of prisoner transfers, there is no conflict among the Circuits on the issue involved in the instant case.

The Ninth Circuit decisions cited by petitioners [(Faieriak v. McGinnis, 493 F. 2d 468(1974); Hillen v. Director, 455 F. 2d 510, cert. denied, 409 U.S. 989 (19720] concerned inter-state transfers involving the same level of custody rather than intra-state transfers entailing a change in custody level. Nor was the issue presented in the instant case addressed by the court in Gray v. Creamer, 465 F. 2d 179(3d Cir. 1972). The bulk of the court's opinion in that case concerned the question of whether the transfer of a prisoner from the general prison population to solitary confinement must be accompanied by minimal due process. After deciding this question affirmatively, the court devoted only a scant paragraph to a consideration of appellants' claim that their transfer to other prisons without hearings violated their due process rights. There is no indication that the transfers in Gray entailed differing levels of custody.*

---

*Petitioners also point to two district court decisions regarding intra-state transfers as conflicting with the instant decision. Benfield v. Bounds, 360 F. Supp. 160 (E.D.N.C.1973); Bundy v. Cannon 328 F. Supp 165 (D. Md. 1971). In fact, in neither case is the holding opposed to that of the Second Circuit here. In Benfield, there was no change in the level of the plaintiff's custody, and for that reason the Court held a due process hearing was not constitutionally required. Moreover, the Court noted that plaintiff had had several opportunities to respond to the factual allegations that led to his transfer, and further held that minimal due process must be afforded before the plaintiff's level of custody could be increased from medium to close. In Bundy, each plaintiff had been given at least some opportunity to reply to the charges which formed the basis for his transfer prior to any action by the District Court. Moreover, the statement that due process was not required where a prisoner was transferred from a lower security institution to a higher one where such a transfer was unaccompanied by extensive confinement in segregation, was simply dictum, since in fact each plaintiff had been so segregated.

In fact, the decision of the court of appeals in this case is in agreement with those of the other federal courts which have considered intra-state transfers involving differing levels of custody. Stone v. Egeler, ____F.Supp.____, 3 Prison L. Rptr. 84 (W.D. Mich. Dec. 18, 1973); Aikens v. Lash, 371 F. Supp. 432 (N.D. Ind., 1974); White v. Gillman, 360 F. Supp. 64 (S.D. Iowa 1973).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: New York, New York
September 18, 1974

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Legal Aid Society
Prisoners' Rights Project
15 Park Row
New York, New York 10038
(212) 374-1737

Of Counsel
DANIEL POCHODA
MARJORIE M. SMITH

Supreme Court U. S.
DEC 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-107

PETER PREISER, Commissioner of Correctional Services of the State of New York, and HAROLD N. BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

against

JAMES NEWKIRK,

Respondent.

BRIEF FOR PETITIONERS

LOUIS J. LEFKOWITZ
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-107

PETER PREISER, Commissioner of Correctional Services of the State of New York, and HAROLD N. BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

against

JAMES NEWKIRK,

Respondent.

BRIEF FOR PETITIONERS

Opinions and Orders Below

The decision of the Court of Appeals for the Second Circuit is reported at 499 F. 2d 1214 (1974), and is reproduced in the petition for certiorari at page 21. The judgment of the United States District Court for the Southern District of New York, dated October 26, 1973, which was affirmed in part and modified in part by the Court of Appeals, is not reported, and is reproduced in the petition for certiorari at page 32. The opinion of the District Court is reported at 364 F. Supp. 497 (1973), and is reproduced in the petition for certiorari at page 34. The decision of the District Court, dated July 31, 1972, denying respondent's motion for a preliminary injunction, is not reported, and is reproduced in the petition for certiorari at page 45.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The decision of the Court of Appeals was rendered on June 3, 1974. The petition for certiorari was filed on August 12, 1974. Certiorari was granted on October 21, 1974.

Statute and Regulations

New York Correction Law, § 23 (1974 Supp.):

> "1. The commissioner of correction shall have the power to transfer inmates from one correctional facility to another. Whenever the transfer of inmates from one correctional facility to another shall be ordered by the commissioner of correction, the superintendent of the facility from which the inmates are transferred shall take immediate steps to make the transfer. The transfer shall be in accordance with rules and regulations promulgated by the department for the safe delivery of such inmates to the designated facility."

New York Code of Rules and Regulations, Title 7, Part 57:

> "Section 57.1. Employees detailed to transfer prisoners from one institution to another, to court, to visit close relatives who are seriously ill, to attend funerals, or any other purpose, shall be held responsible for the safety and security of such inmates from the time they leave the institution until they arrive at their destination or until they are returned to the institution. Employees on this assignment shall be carefully selected and shall be men who can be relied upon to make proper decisions. When situations arise which are not covered by specific instructions, employees shall exercise their best judgment in view of their responsibility for the custody of the inmate and for the best interests of the department."

Questions Presented

1. Whether a prison inmate who is transferred within a state from a medium security institution to a maximum security instituiton, without the imposiiton of disciplinary punishment, is entitled under the Due Process Clause to notice of charges and an opportunity to be heard?

2. Whether the courts below correctly ruled that respondent's case was not moot, although respondent was retransferred to a medium security facility ten months prior to the District Court's decision, and faced no imminent likelihood of being transferred to another institution?

Statement of the Case

A. Prior Proceedings

This action was commenced by respondent James Newkirk, and two other New York State inmates, Cornelius Lucas and Carl Oliver, on July 5, 1972. Newkirk and his co-plaintiffs alleged that on June 8 and 9, 1972 they were transferred from Wallkill Correctional Facility, a medium security institution, to Clinton Correctional Facility and Auburn Correctional Facility, maximum security institutions, in violation of their rights under 42 U.S.C. § 1983. Plaintiffs alleged that they were transferred without an opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment, and that they were entitled to written notice of charges, a right to call and confront witnesses, representation by counsel and a hearing before an impartial body. Plaintiffs also alleged that the "unexplained fact" of their transfers from medium to maximum security institutions would "adversely affect their chances for release on parole." (Complaint, p. 5, ¶ 6, annexed to Order to Show Cause, dated July 5, 1972). Plaintiffs sought a preliminary injunction ordering their re-

turn to Wallkill Correctional Facility pending further proceedings in the action.

On July 13, 1972 plaintiffs filed an amended complaint adding a fourth inmate, David Rodriguez. Plaintiffs alleged that Rodriguez, as well as Newkirk, Lucas and Oliver, had been improperly transferred from Wallkill Correctional Facility to maximum security institutions in violation of their rights under the Due Process Clause. Plaintiffs repeated the allegation that the unexplained fact of their summary transfers would adversely affect their chances for release on parole (Amended Complaint, p. 6, ¶ 17, filed July 13, 1972).

On July 31, 1972 the District Court (McLean, D.J.), denied plaintiffs' motion for a preliminary injunction. The District Court held that plaintiffs had not demonstrated a strong likelihood of ultimate success on the merits, and had not presented evidence of severe injury. The District Court stated that to grant plaintiffs preliminary relief would be to grant them substantially everything they could obtain if they were successful at trial. The District Court directed the parties to meet with the Court on September 6, 1972 to fix a date for trial. (See decision of July 31, 1972 at page 45 of the petition for certiorari).

On November 17, 1972, shortly before the trial commenced, plaintiffs filed another amended complaint on behalf of Newkirk, Lucas, Oliver and Rodriguez. Plaintiffs repeated their previous allegations that they had been transferred from Wallkill Correctional Facility to maximum security institutions, in violation of their rights under the Due Process Clause. However they added the contentions that they were denied the equal protection of the law by not being afforded the same administrative hearings that were afforded to inmates who faced disciplinary punishments, and that their First Amendment rights were chilled and their right of access to the courts diminished, by reason of their transfers. Once again plaintiffs alleged

that the unexplained fact of summary transfers would adversely affect their chances for release on parole, notwithstanding the fact that plaintiff Oliver was granted parole on September 6, 1972 and plaintiff Rodriguez was granted parole on October 19, 1972. (See second Amended Complaint, p. 8, ¶ 20, and defendants' Answer to Amended Complaint, p. 4, ¶ 11).

On November 27, 1972 trial was commenced before District Judge Robert J. Ward.* At the outset plaintiffs moved to dismiss the action as to Carl Oliver and David Rodriguez because they had been released on parole and their cases were moot. The District Court granted this motion without prejudice and without costs (Trial Minutes, p. 4). Thereafter the trial began and continued for three days. The District Court heard testimony from respondent Newkirk, his co-plaintiff Cornelius Lucas, and two other witnesses on their behalf. The Court also heard testimony from petitioner Harold Butler, and a witness on his behalf. At the close of the trial the District Court reserved decision, and the parties undertook to settle the case voluntarily.

Petitioner Butler agreed to the return of respondent Newkirk and Cornelius Lucas to Wallkill Correctional Facility directly from New York City, where the trial was held. The attorneys for both sides discussed the possibility of a consent decree, but no final agreement was reached on this issue. On December 18, 1972 respondent Newkirk was restored to his truck driving job at Wallkill, which was the position he held prior to his transfer, and on February 22, 1973 Cornelius Lucas was released from Wallkill on parole. As a result of these intervening events petitioner Butler moved on March 22, 1973 to have the entire case dismissed as moot. Respondent opposed this motion, and the District Court reserved decision.

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* District Judge McLean had died in the interim.

On October 9, 1973, approximately ten months after respondent Newkirk had been returned to Wallkill, the District Court rendered a decision granting declaratory relief on his behalf. The District Court held that the case of Cornelius Lucas was moot because he had been released on parole, and that respondent Newkirk's prayer for injunctive relief required dismissal because the threat of a transfer was not sufficiently great to warrant an injunction. However, notwithstanding the fact that there was "not a sufficiently delineated controversy" to merit the granting of injunctive relief, the District Court declared that respondent's rights were violated by not being informed of the rule violations which would result in a transfer from Wallkill to another institution. The Court directed that the prison authorities make known to respondent the scope of permissible behavior and the circumstances which in their judgment would warrant a transfer from Wallkill. (See petition for certiorari at pages 34-43; 364 F. Supp. at 499-504).

On October 26, 1973 the District Court issued its final judgment on respondent's behalf. The District Court ruled that respondent's interest in remaining at Wallkill was sufficiently great to require some sort of notice that his activities might result in a transfer, or at least the knowledge that a transfer was a possibility. The Court also ruled that the situation at Wallkill on June 8, 1972 did not present so clear and present a danger to the security of the prison as to justify a transfer without warning, and that transfers from Wallkill to maximum security institutions were used for disciplinary purposes.

The District Court declared that Newkirk could not be transferred without being afforded due process, including (a) prior notice of the rules of the institution and what acts on his part would lead to his being transferred; and (b) a hearing at which he was informed of the charges against him and afforded an opportunity to explain his behavior before a relatively impartial tribunal either prior to

the transfer or if prompt action is essential, as soon thereafter as practicable. (See Judgment of October 26, 1973 at pages 32-33 of the petition for certiorari). Thus, although eschewing injunctive relief in its decision, the District Court effectively enjoined petitioners from transferring respondent without the due process procedures set forth in the Court's order.

The judgment of the District Court was modified in part and affirmed in part by the Court of Appeals for the Second Circuit. In its decision of June 3, 1974 the Court of Appeals agreed with the lower court that an informal hearing was necessary to give respondent an opportunity to explain his activities, prior to a transfer to another institution. The Court of Appeals also held that the District Court's judgment satisfactorily prescribed the minimum due process to which respondent was entitled. However, the Court of Appeals ruled that it is was not necessary for the prison officials to give respondent notice of all future activities which would result in a transfer, and it modified the District Court's judgment to this extent. (See petition for certiorari at pages 21-31; 499 F. 2d 1214).

B. Facts of the Case

At the trial the following salient testimony was given by the parties and witnesses.

Respondent Newkirk testified that he had been a New York State prison inmate since his conviction for murder in the second degree in 1962 (5a). He stated that prior to his placement at Wallkill Correctional Facility he had been an inmate at Ossining Correctional Facility, Attica Correctional Facility, Green Haven Correctional Facility and Auburn Correctional Facility (5a, 7a, 31a)* He said that

* All of these facilities were maximum security institutions at the time Newkirk was confined in them, and are located in different parts of New York State.

when he was transferred to Auburn Correctional Facility in 1968, he was eventually permitted to study some aspect of auto mechanics, but not the aspect he wished to study (8a).

He said that upon his transfer to Wallkill he was permitted to take instruction in auto mechanics, and later permitted to drive a truck and to leave the grounds in a truck (8a, 10a). He said he attended classes in mathematics, English and history, and also engaged in musical activities by playing in a band and practicing his musical instruments during his leisure time (9a, 13a). He said he was permitted to go about the institution on his own (13a).

Newkirk stated that on June 8, 1972 he was performing his usual truck driving duties, when he was ordered to report to the prison hospital, while his belongings were packed by the guards (29a-30a). He said he was then transported to Clinton Correctional Facility, a maximum security institution in another part of the State, without being advised of the reason for the transfer, and without being given an opporunity to be heard (30a). He admitted, however, that when he previously was transferred from one institution to another, no officials told him of the reason for the transfer (45a).

Newkirk said that when he was transferred from Wallkill to Clinton, he was not given an assignment in driving or auto mechanics, but he accepted an assignment to do housework in the Superintendent's residence. He said that no one forced him to accept this assignment, and that the residence was located outside the prison walls (11a, 34a). He said his wage was fifty-five cents per day, which was the same wage he earned as a truck driver at Wallkill (36a, 25a). He said he had requested a truck driving assignment upon his arrival at Clinton, but had not renewed his request because he believed he was on a waiting list (36a).

Newkirk further stated that he had permission to keep his musical instrument in his cell at Clinton, but because

of his long working hours he did not have time to practice it (37a). He said that he did not have access to as many recreational activities at Clinton as he had at Wallkill, and he was not able to pursue his interests in glass work, painting and stone ware, that he pursued at Wallkill. He also said that at Clinton he was not permitted to possess certain articles in his cell, such as a lamp or typewriter, which he possessed at Wallkill, and he was more limited in his access to showers and hot water, and visiting and telephone privileges (17a-19a, 21a).

Significantly, Newkirk acknowledged that he was not placed in disciplinary confinement upon his arrival at Clinton, and that he did not lose any good behavior allowances as a result of the transfer (37a, 44a). He further acknowledged that his transfers between other institutions prior to his placement at Wallkill, had resulted in a diminution of family visits (32a), and that his first assignments at Wallkill were to perform porter duties and to haul garbage, whereas his previous assignment at Auburn Correctional Facility was to repair automobiles (33a). He further stated that his initial wage rate at Wallkill was twenty-five cents per day, whereas his initial wage rate upon his transfer to Clinton was thirty cents per day (25a, 36a). He said that prior to coming to Wallkill he had studied mathematics, science and English at Auburn (33a).

Newkirk stated that during the period preceding his transfer from Wallkill he became interested in the concept of an inmate labor union, and signed a union constitution on May 31, 1972. He said that on June 2, 1972 another Wallkill inmate gave him a union petition to sign, and he did so, and passed it on to other inmates with instructions to return it to the inmate who gave it to him (23a, 26a). He said that later in the evening he heard an announcement over the public address system from a member of the inmate liaison committee, stating that the liaison committee had not sanctioned the union petition, and would meet with any inmates who wished to discuss the matter (27a). New-

kirk said that he did not become involved in any arguments, fights or threats over the union issue, and did not speak to any officers about it, and did not have further contact with authorization forms prior to his transfer from Wallkill on June 8, 1972 (28a-29a).

Coy Smith, a former Wallkill inmate, testified on Newkirk's behalf. Smith said that on June 2, 1972 he did not observe any unusual activity, but he recalled an announcement over the public address system by a member of the inmate liaison committee (Trial Minutes, 173). Smith remembered that the announcement stated that the inmate liaison committee was not responsible for the circulation of union petitions, and that the committee would meet with inmates at a designated place to answer questions about its position (T.M. 174).

Smith said that fifteen or twenty inmates met with the members of the liaison committee on that night (T.M. 178). Some inmates wanted to know why the committee was not supporting the union if the committee was supposed to represent the inmates, and one committee member was telling the inmates that the committee would support the union if it went through proper channels (T.M. 179). Smith said that there were no fights or threats; but that there was some heated discussions; and that the inmates were speaking in loud voices trying to outtalk each other (T.M. 179). He said that some inmates hollered back and forth, and some inmates did not like the way the inmate liaison committee member was answering questions (T.M. 190). He said the inmates were not angry about having signed the petition, but that some of them were confused about what they had signed and were fearful of administrative reprisals (T.M. 194; 146a).

Smith acknowledged that he had not been disciplined for signing a union constitution, and although petitioner Butler questioned him about it, no action was taken against him, and he was paroled in September, 1972 (T.M. 200).

Eugene Eisner, an attorney specializing in labor law, also testified on behalf of Newkirk. He described the steps that were being taken to place the union petition of the Wallkill inmates before the New York State Public Employees Relation Board (Trial Minutes, 338-350; 147a-151a).

Walter Dunbar, a former deputy commissioner of correctional services, testified on behalf of petitioners. Dunbar stated that his experience in the correctional field included being a corrections officer, a supervisor of a crime study commission in California, a training officer of all personnel in the California Department of Corrections, an associate warden, a deputy director and director of the California Corrections Department; a chairman and member of the United States Board of Parole, a past president of the American Correctional Association, an editor of the *Manual of Correctional Standards,* and a member of the United States Attorney General's task force for innovative grants to improve corrections (T.M. 367-68).

Dunbar said that there are a variety of reasons why an inmate may be transferred between correctional facilities. These include different quotas for different programs, an individual's adjustment to his assignment, critical information that indicates a danger to staff or personnel, and separation of inmates due to prior criminal experience together or hatred of one another (T.M. 370-71). He said that transfer decisions are made at the institutional level by the superintendent and the classification committee, and made at the departmental level by a director of clasification and movement (T.M. 372). He said that where transfers are necessitated by problem at institutions, a superintendent has the prerogative and responsibility to bring the matter to the attention of the correction department (T.M. 373). He said that a superintendent has an acute responsibility to insure the safe and secure operation of his institution, and this may include dangerous or recal-

citrant inmate behavior, homosexual triangles, the threat of violence between individuals, the threat of weapons being introduced, and other behavior which would disturb the order and stability of the institution (T.M. 373).

Dunbar further stated that giving advance notice to an inmate prior to a transfer might create a security problem, because the inmate might resist violently, and other inmates might attempt to assist him (T.M. 376-77). He said that conducting hearings would also create a problem because the revelation of confidential information leading to a transfer would be hazardous to the inmate or others (T.M. 378). As an example he intimated that a superintendent could not run the risk of permitting weapons or drugs to be introduced into an institution before taking action to prevent it (T.M. 378-79).

Dunbar stated that in the instant case a member of the department's classification staff had informed him that due to the circulation of petitions at Wallkill, there was a possibility of a confrontation between inmates of a different point of view, and a possibility of violence which warranted the transfer of certain inmates (T.M. 375-76). Dunbar said that upon respondent's transfer from Wallkill to Clinton, there was no directive that respondent be placed in segregation, or lose any good behavior allowances, or suffer any punishment or deprivation of privileges as a result of the transfer (T.M. 379).

Petitioner Butler testified on his own behalf. He stated that he began his career as a prison guard, and worked his way up to sergeant, lieutenant, assistant deputy superintendent, deputy superintendent, deputy commissioner in the correction department and Superintendent at Wallkill (46a-47a).

He said that Wallkill was a medium security institution with cells left open twenty-four hours per day, and a perimeter wire fence surrounding a portion of the facility (47a). He said that it had extensive academic and vocational training programs, and many innovative programs that other institutions do not have (48a). He said that Wallkill did not have a special housing unit or an isolation wing, and that inmates were chosen to go there by the Wallkill staff, and did not have a right to go there (48a).

Butler stated that if there were hostilities between inmates, they would have to be transferred from Wallkill, whereas at maximum security institutions they would be placed in special housing for their own protection. He said that it would be impossible to isolate or segregate or control any section of the facility (49a). He said that during the eighteen months prior to trial, 59 inmates had been transferred from Wallkill to other institutions, eighteen of which were deemed unsuitable for the Wallkill program. He said that these cases involved some inmates who were engaged in homosexual activities, some inmates who refused to become involved in the Wallkill program, and one inmate who was involved in a serious fight (50a). He said that when inmates are transferred as unsuitable they are usually brought up on disciplinary charges, but that not all transfers were based on disciplinary offenses (50a-51a).

Butler said that he would not necessarily speak to an inmate prior to transfer, since it would depend on the purpose of the transfer (51a). He said that in an emergency situation a telephone call is made to the central office, and the central office generally accepts the request and determines which institution the inmate is sent to (52a). He said that the officers remove the inmate to the prison hospital while his belongings are packed and recorded on a transfer sheet, and then transport the inmate with his belongings to another facility. He said this procedure is followed to prevent inmates from barricading themselves in their cells or encouraging fellow inmates to assist them in preventing the transfer (53a).

With respect to the instant case, Butler said that on June 2, 1972 he received a telephone call at home, at 6:30

P.M., from an officer, who told him that a number of inmates were circulating a petition. Butler said that he was advised that there was no difficulty, and he told the officer not to interfere with the petition, but to keep the situation under observation and control (54a). Butler said that he received a second phone call one hour later, telling him that the inmate liaison committee members were very disturbed because they had learned that the petitions were purportedly being circulated as having been sponsored by them. Butler spoke to one of the committee members, who asked to address the inmates over the public address system, to advise them that the committee did not sponsor the circulation of the petitions. Butler heard the inmate's prepared statement over the phone, and then gave him permission to use the public address system (54a).

Butler said he received a third telephone call about one-half hour to one hour later, in which the officer advised him that unrest and tension had developed, and that there were loud arguments erupting in various parts of the institution. Butler ascertained that no fights had occurred and he told the officer to keep the matter under careful supervision and to let him know if anything developed (54a-55a). Nothing further happened that night, and the institution remained calm on the next two days, June 3 and 4, 1972 (55a).

On June 5, 1972, Butler asked a deputy superintendent to investigate the situation with respect to the union petitions, and the deputy reported that there was considerable tension, and that a group of inmates had been very vocal in their support of an inmate labor union, and the members of the inmate liaison committee were equally vocal in assuming that the union would detract from their authority or make their function useless (55a). On June 6, 1972, Butler called the central office and told them that there were a number of inmates who were creating a situation that could lead to trouble, and that he would like to transfer them to other facilities without disciplinary action.

Butler said that he was fearful that at the upcoming Saturday night movie, an argument or serious discussion might end up in a riot. Butler also directed a supervisory officer to be present at the weekly meeting of the inmate liaison committee, to insure that no trouble occurred there (55a, 57a).

Butler said that the assistant deputy superintendent reported to him that there were eight inmates, including plaintiffs, who were continuing to voice support for the inmate union, and that he was fearful that there may be trouble (57a). He said that he conferred with his staff and decided to transfer five of these men, who were active in support of the union (58a). Butler said that he did not normally oppose the circulation of petitions at Wallkill, but he was concerned about the union petition because of the attitude of the inmate liaison committee and other inmates against the petition (57a). He said that he did not confiscate the petitions or prevent them from leaving the institution (59a).*

With respect to the five inmates who were transferred, Butler did not institute any disciplinary proceedings against them, and did not cause them to lose any good time or to be placed in segregated confinement, or to be treated differently at the receiving institutions (58a). At the time of the trial, two of the five already had been paroled, as were various other inmates who had participated in the union activities (58a).

The District Court also had before it in evidence, a deposition of the Wallkill inmate who was in charge of the inmate liaison committee, Warren Barnes. (See Plaintiffs'

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* The petitions for the formation of a labor union (203a), were presented to the New York State Public Employees Relations Board, and rejected by that agency. See *Matter of Prisoners' Labor Union* v. *Helsby*, 44 A D 2d 707, 354 N.Y.S. 2d 694 (1974), amended 45 A D 2d 719 (1974), lv. to app. denied —— N Y 2d —— (1974).

Exhibit 28, T.M. 449-50). In this deposition Barnes stated that he was upset by the manner in which union petitions were circulated on June 2, 1972, because he believed that there was "a patent lie" involved in it, namely that the inmate liaison committee was sanctioning the petitions (Ex. 28, p. 116). Barnes said that he requested permission from petitioner Butler to use the institution's public address system because he wished to inform the inmate population that the liaison committee was not sponsoring the petitions (Ex. 28, 119-121). Barnes said that he and the other members of the liaison committee met with the inmates shortly afterwards to discuss the matter, and that twenty-five or thirty inmates were waiting for him, and another forty or so joined the group (Ex. 28, 123). He said that there was loud and lively discussion, but no violence (Ex. 28, 123-124). He said that subsequently he perceived no threats of violence as such in the institution, but that there was "continuing unrest" regarding the announcement of the liaison committee and the inmates' fear that they would get into difficulty because they had signed the petitions (Ex. 28, 130).

Summary of Argument

The transfer of inmates between state penal institutions is an area of prison management that should be left to the discretion of correctional administrators. Unlike disciplinary offenses which are based on acts of misconduct and violations of prison rules, transfers are based on an evaluation of an inmate's adaptation to an institution or program, or on the need to separate hostile inmates before confrontations take place. Transfers are part of the classification process and do not lend themselves to traditional due process procedures such as notice of charges or an opportunity to be heard. In many transfer cases there is a need for summary disposition by the prison authorities to avoid assaults on inmates or destruction of property. Where no

disciplinary punishment is imposed in connection with the transfer, the inmate does not suffer a grievous loss by being sent to another institution, since movement between institutions and parts of institutions is a routine concommitant of prison life. Transfers should be immune from the due process procedures that this Court has established for parole hearings and prison disciplinary proceedings involving substantial punishment. The orders of the courts below should be reversed on the law.

In addition the instant case was moot at the time the District Court rendered its decision and judgment. At the close of the trial respondent was returned to a medium security facility and restored to his previous job. The prison authorities had no intention of transferring him to another institution, and whether he would have been transferred in the future was entirely speculative. When the District Court decided the case the situation had been stable for ten months, and there was no longer a case or controversy.

ARGUMENT

POINT I

The Courts below erred in ruling that a prisoner who is transferred within a State from a medium security institution to a maximum security institution, without the imposition of disciplinary punishment, is entitled under the Due Process Clause to notice of charges and an opportunity to be heard.

This case presents significant issues concerning the application of the Due Process Clause to the administration of penal institutions. At issue in the direct sense is whether an inmate who is transferred between state institutions of different custody levels, is entitled to a due process hearing prior to or subsequent to the transfer. At issue in the broader sense is whether a prisoner who experiences a loss

of privileges but does not suffer disciplinary punishment, is entitled to due process guarantees. The resolution of these issues is necessary in view of this Court's decision in *Wolff* v. *McDonnell*, 42 U.S.L. Week 5190 (June 26, 1974), holding that inmates who faced a loss of good behavior allowances as a punishment for disciplinary offenses, were entitled to written notice of charges, an opportunity to call witnesses and present evidence at a hearing and a written statement by the disciplinary panel as to the evidence relied on and reasons for the disciplinary action. This Court noted that these procedures also would apply to the imposition of solitary confinement as a punishment, but stated that, "We do not suggest, however, that the procedures required by today's decision for the deprivation of good-time would also be required for the imposition of lesser penalties such as the loss of privileges." (42 U.S.L. Week at 5200, n. 19).

The transfers in the instant case did not result in either the imposition of disciplinary penalties or the loss of good behavior allowances. Rather they are an example of an administrative transfer, which is designed to protect the safety of an inmate and the security of an institution. What is involved is classification, not punishment, and a brief examination of the classification process will make it evident that transfers should remain a matter of complete administrative discretion.

One of the most important tools of prison management is the power to decide which institution an inmate should be incarcerated in. Virtually all prison systems have classification boards at receiving institutions which determine the facility that an inmate is best suited for. These determinations are based on the age of the inmate, the length of his sentence, the nature of his crime, the situs of the conviction, the educational and vocational level of the inmate, the availability of programs that are commensurate with his level, and the relative populations at the institu-

tions where the inmate might be sent. The classification board may also consider an inmate's past history at an institution under a previous sentence, the presence of former crime partners or enemies at an institution, and an inmate's cooperation with law enforcement agencies in providing confidential information about criminal activities.

The multifaceted aspect of these placement decisions makes it clear that they are based on professional expertise, and that they are ill-suited to the demands of due process. Thus an inmate does not have a right protected by the Due Process Clause, to be assigned to a prison of his choice, nor does he have a right to be incarcerated in a particular area of a state. One of the disabilities of a prison sentence is a loss of freedom of movement which which is enjoyed by an ordinary citizen. Even a parolee does not enjoy an unrestricted right to travel where he chooses. Cf. *Berrigan* v. *Sigler*, 499 F. 2d 514 (D.C. Cir. 1974).

The transfer of inmates between institutions within a system, must be viewed from the same perspective as the initial placement of inmates at institutions. Once an inmate has been assigned to a particular facility, there is no guarantee that his confinement will be beneficial or uneventful. One of the most serious problems facing penal administrators is the danger of assaults committed by prisoners on fellow prisoners. As Justice White noted in *Wolff* v. *McDonnell*, in rejecting the full range of parole revocation procedures for prison disciplinary hearings, many prisoners are "recidivists who have repeatedly employed illegal and often very violent means to attain their ends," and they "may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life." (See 42 U.S.L. Week at 5197).

The recent case law illustrates that the danger of inmate assaults is no chimera. In *Bourgeois* v. *United States*, 375 F. Supp. 133 (N.D. Tex. 1974), the court awarded a total

of $40,000 in damages against the federal government because of the negligence of its employees in failing to prevent an assault by one inmate on another. In *Brown* v. *United States*, 374 F. Supp. 723 (E.D. Ark. 1974), the court awarded $500 in damages against the government because it failed to provide adequate protection for a federal prisoner in a county jail. In *Curtis* v. *Everette*, 489 F. 2d 516 (3rd Cir. 1973), the court held that three correctional employees would be liable for failing to prevent an attack by one inmate on another, which they had reason to believe would take place. In *Woodhous* v. *Virginia*, 487 F. 2d 889 (4th Cir. 1973), the court held that a prisoner has a right, secured by the Eighth and Fourteenth Amendments, to be reasonably protected from constant threat of violence and sexual assault by fellow inmates, and need not wait until he is actually assaulted to obtain relief.

See also *Gates* v. *Collier*, 501 F. 2d 1291, 1309 (5th Cir. 1974) (infliction of physical injuries on inmates is no less tolerable if committed by inmates with acquiescence of prison authorities, than if perpetrated by prison superintendent).

These cases make it clear to prison administrators that if they ignore threats to the safety of prisoners in their custody, they do so at the risk of being liable in money damages for failing to exercise their duty of care. See e.g. 18 U.S.C. § 4042 (Bureau of Prisons shall provide for the safekeeping, care and protection of persons in federal custody). In addition, it would be a callous and incompetent prison official who would wait for an assault to take place before acting to protect an inmate whose safety was threatened. A prison official must act expeditiously, and must err on the side of caution, in order to prevent an attack which may cause permanent injury to a prisoner.

One of the ways in which an inmate's safety can be protected is to place him in a different part of an institution, or in a different institution, where he can have no further

contact with a potential assailant. In the instant case, as petitioner Butler testified, it was not possible to separate inmates at Wallkill Correctional Facility by placing them in different portions of the institution, because Wallkill is a medium security facility with open galleries and easy access to all parts of the building. Thus the only way to avoid a potential confrontation at Wallkill is to transfer inmates to other New York State Correctional Facilities.

What has been said with respect to the protection of individual inmates, applies with greater force to the protection of groups of inmates who are struggling for power, and to the protection of entire institutions which are threatened by riots and strikes. Once again it would be a derelict prison warden who did not err on the side of caution, and did not remove suspected troublemakers before violence erupted. The problem of mass disruption is even more serious than the problem of individual assaults, since the danger to human life is greater, and the destruction of institutional property almost a certainty. See South Carolina Department of Corrections, *Collective Violence in Correctional Institutions*, 43-74 (1973) (history of prison riots from 1900-1971).

In addition to the prevention of assaults and destruction of property, there are other reasons for permitting prison administrators to have discretion in transferring inmates between institutions within a system. The power to transfer prisoners is essential to the establishment of effective rehabilitation programs and experimental projects. Many programs are initiated with the assumption that if the program is unsuccessful, the participants can be removed to other facilities with a minimum of difficulty. In like manner, if an inmate does not adapt to a program or if he acts in a manner which threatens prison security, he can be removed expeditiously to another facility, and replaced by a more deserving inmate. Finally, some transfers are necessitated by budget cuts and staff reductions, that make it

necessary to close down portions of institutions or to terminate special programs.

The magnitude of the transfer problem must be understood in addition to the reasons why transfers between institutions are necessary. In New York State there are six correctional facilities that are designated as maximum security institutions (Attica, Auburn, Clinton, Green Haven, Ossining and Great Meadow), eight correctional facilities or portions of correctional facilities that are designated as medium security institutions (Adirondack, Bedford Hills, Coxsackie, Elmira, Eastern, Fishkill, Tappan and Wallkill), six correctional facilities which are designated as minimum security institutions (Albion, Bayview, Edgecombe, Parkside, Rochester and Taconic), and four correctional camps which are designated as minimum security facilities (Pharsalia, Monterey, Summit and Georgetown). See 7 NYCRR Part 100, §§ 100.1-100.94. It is apparent that in a system with this many institutions of different security levels, and a total inmate population of approximately 15,000, the procedures ordered by the lower courts are going to impose a formidable administrative burden on the Department of Correctional Services, and a formidable burden on the federal courts that will inevitably be called upon to review these determinations.*

In recognition of the magnitude of the problem and the administrative difficulties that underlie transfers of inmates, the laws of many states and federal law empower correctional authorities to transfer adult felons between institutions at their discretion. See N.Y. Correction Law, § 23, *supra*, p. 2. A typical provision is found in 18 U.S.C. § 4802: "The Attorney General may designate as

* The Department has advised the Attorney General that during 1973 there were 14,000 transfers between state institutions, and that during 1972 the total was approximately 9,800. The large increase is due to an expanded number of facilities, and increased use of medium and minimum security institutions. The totals for the first ten months of 1974 already exceed the 1973 totals.

a place of confinement any available, suitable and appropriate institution or facility . . . whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another." Another example is found in Wisconsin statutory law: "Inmates of a prison may be transferred and retransferred to another prison by the Department" (Wisc. Stat. Ann., § 53.19 [1974 Supp.]). See Alaska Stat. § 33.30.120 (1972 Supp.); Mass. Ann. Laws Ch. 127, § 97; Neb. Rev. Stat. § 83-176 (1971 Vol.); N.J. Stat. Ann., § 30:4-85; Okla. Stat. Ann., Tit. 57, § 510 (1974 Supp.); Pa. Stat. Ann., Tit. 61, § 78; Vt. Stat. Ann., Tit. 28, § 702 (1974 Supp.); Va. Code § 53-8. See also So. Dak. Comp. Laws § 24-6-6 and Ky. Rev. Stat. § 197.065, which authorize transfers of inmates between prisons and reformatories.

These statutes reflect a collective legislative judgment that transfers of inmates between penal institutions should be left to the unfettered discretion of prison administrators. Stated another way, these statutes recognize that an inmate does not have a right to be assigned to a particular prison, or to protest if he is removed from an institution which he prefers. The policies underlying this legislative judgment, should also govern the analysis of the due process issue in the instant case.

It is axiomatic under the Due Process Clause, that the process which is due to an aggrieved party is a function of the exigencies of a situation and the loss which he may suffer. A classic formulation of this principle appears in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), where this Court stated:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (Frankfurter, J., concurring), and

depends upon whether the recipient's interest in avoiding that loss outweights the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). 'Consideration of what procedures due process may require under any set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'" (397 U.S. at 262-63).

As a result of this principle a parolee does not receive the same protections at a parole proceeding as a person accused of a crime receives at a trial, and a parolee does not receive the same safeguards at a preliminary hearing that he receives at a final revocation hearing. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). In like manner a prisoner facing a loss of good behavior allowances does not receive the same protections as a parolee facing a loss of liberty. *Wolff* v. *McDonnell, supra.* See also *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (right to counsel at parole and probation revocation hearings is not governed by fixed rule, but depends on facts of individual cases). Applying these concepts to the instant case, and weighing the government's need for summary adjudication against the loss suffered by the aggrieved party, it becomes clear that the lower courts erred in applying due process procedures to intrastate transfers, that were unaccompanied by disciplinary punishments.

At the outset it is noteworthy that transfers are one area of penal administration where giving an inmate notice of charges and an opportunity to be heard, may be detrimental to institutional safety and security. At the trial, petitioner Butler and Deputy Commissioner Dunbar, both of whom were experienced correctional administrators, testified that inmates are never told in advance that they are being removed from an institution. This is to prevent

them from barricading themselves in their cells or arousing other inmates to oppose the transfer. To afford an inmate notice of charges and an opportunity to be heard before being sent to another facility, might well create the assault or disturbance that the transfer was designed to prevent. Furthermore the transfer might be based on confidential information which could not be made known at a due process hearing. In *Morrissey* v. *Brewer, supra,* and *Wolff* v. *McDonnell, supra,* this Court recognized that even a parolee who was facing a loss of liberty or a prisoner who was facing disciplinary punishment, was not entitled to be informed of all of the evidence against him, if there was a need for confidentiality.

In addition to transfers based on security considerations, there are also transfers based on intangible considerations such as a warden's professional judgment that an inmate is not benefiting from the programs in an institution, or a warden's judgment that an inmate is a troublemaker who is stirring up dissension among other inmates and guards. While these factors cannot be the basis of disciplinary punishment, they should be the basis of allowing a warden to decide whether an inmate should remain at an institution. Unlike acts of misconduct and discrete rule violations which can be set forth in disciplinary charges and adjudicated at hearings, the intangible factors upon which a warden may wish to transfer an inmate do not easily lend themselves to "notice of charges" or an opportunity to be heard. Holding a hearing at the receiving institution rather than the sending institution, after the transfer has been completed, does not alleviate the fundamental inappropriateness of conducting such hearings, and creates the added problem of transmitting witnesses and records to an institution that may be far away from the sending institution.

An analysis of the loss suffered by an inmate in a transfer situation which is not accompanied by disciplinary punishment, also leads to the conclusion that due process

procedures are not required. As we noted above, a prison inmate suffers certain disabilities as a result of being committed to an institution for the service of his sentence. See *Price* v. *Johnston*, 334 U.S. 266 (1948). In addition to a loss of freedom of movement, these disabilities include a lesser degree of protection at a disciplinary hearing than a parolee receives at a revocation hearing or a criminal defendant receives at a trial, *Wolff* v. *McDonnell, supra;* a qualified right to receive correspondence or literature that may be restricted by an important governmental interest that is unrelated to the suppression of expression, *Procunier* v. *Martinez*, 416 U.S. 396 (1974); and a limited right to meet with members of the press, that may be restricted when alternative means of communication are available, *Pell* v. *Procunier*, 42 U.S.L. Week 4998 (June 24, 1974); *Saxbe* v. *Washington Post Co.*, 42 U.S.L. Week 5006 (June 24, 1974). See also *Richardson* v. *Ramirez*, 42 U.S.L. Week 5016 (June 24, 1974) (disenfranchisement of felons who have completed their sentences does not violate the Fourteenth Amendment).

The loss of privileges that an inmate may experience when he is transferred between penal institutions, or when he is removed from a particular program at an institution, or when he is transferred from one part of an institution to another part of an institution, is a concomitant of prison life that results from the status of incarceration. If the courts were to recognize a right protected by the Due Process Clause to every educational program, training program or recreational program that was valued by a prisoner, it would be impossible to administer correctional institutions without conducting hearings on virtually every decision that affects a prisoner's daily life.* We do not believe that

* The Court of Appeals for the Second Circuit has since ruled in another case that an inmate who is transferred between maximum security facilities is also entitled to a due process hearing. See *Montanye* v. *Haymes*, No. 74-520 (Certiorari petition pending).

the Due Process Clause was intended to have this function, but rather it was intended to protect inmates against grievous losses and more substantial invasions of their liberties.

In the instant case the trial testimony of respondent Newkirk indicated that he suffered some disadvantage in connection with all of his transfers between various state facilities. When he was transferred from Green Haven Correctional Facility to Auburn Correctional Facility, at his own request, he was not able to see his family as frequently. When he was transferred from Ossining Correctional Facility to Attica Correctional Facility, not at his request, he also saw his family less frequently. When he was transferred from Auburn Correctional Facility to Wallkill Correctional Facility, at his request, he initially received a lower paying job at Wallkill. These examples are but a few of the myriad ways an inmate may experience some deprivation when he is sent from one institution to another, regardless of the level of custody.

The trial testimony also indicated that after the disputed transfer from Wallkill Correctional Facility to Clinton Correctional Facility on June 8, 1972, Newkirk ultimately earned the same wage at Clinton that he earned at Wallkill, and ultimately obtained a job at the Superintendent's house which took him out of the institution each day. The record below also indicates that three of Newkirk's co-plaintiffs were paroled after the disputed transfers, thus making it clear that the transfers had no adverse parole consequences.

Bearing all of this in mind, we believe that this Court should rule as a matter of law that the intrastate transfers in the instant case, which were not accompanied by disciplinary punishments, did not constitute a sufficiently grievous loss to warrant the application of the Due Process Clause. Rather this Court should hold that the transfers at issue in this case do not fall within the coverage of the *Wolff* and *Morrissey* decisions. In this respect we believe that the rule which this Court should adopt is illustrated

in *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971), a case involving the transfer of prisoners from minimum and medium security institutions, to a maximum security prison as a result of a work stoppage.

In *Bundy* the court held that insofar as the transferred inmates were placed in solitary confinement at the receiving institution, they were entitled to the same due process procedures that they would have received if they were placed in solitary confinement at the sending institution. However, with respect to the change in custody level between the sending institutions and the receiving institution, the court held that this did not raise a constitutional issue:

> "A prisoner has no vested right to be assigned to or to remain in a medium security or a minimum security institution. The Division of Correction has the right to transfer prisoners from one institution to another, whether to a higher, equal or lower security status, for administrative, therapeutic, adjustment or other reason, without the need for a hearing under those procedures." (328 F. Supp. at 173)

The *Bundy* approach is a sensible one because it protects an inmate's right not to be arbitrarily punished, but recognizes that an inmate has no right not to be transferred between penal institutions. The error of the lower court rulings in the instant case is that they established an inmate's right, which is protected by the Due Process Clause, to remain at a particular facility. We believe that these rulings are unsound from the point of view of prison management, because they will diminish the effectiveness of programs utilizing medium and minimum security facilities, and because they give too much weight to the loss of privileges which are routinely experienced in prison life.

This Court should reverse the decisions of the lower courts, and rule that transfers within a state, without the

imposition of disciplinary punishment, are not governed by the due process procedures set forth in *Wolff* v. *McDonnell*, *supra*, and do not require advance notice or an opportunity to be heard.

POINT II

The Courts below also erred in not dismissing respondent's case as moot. At the time the District Court decided the case there was no longer a live controversy between the parties.

In its recent decisions this Court has expressed concern that the litigants before the Court satisfy the "case and controversy" requirement of Article III of the Constitution. In *De Funis* v. *Odegaard*, 416 U.S. 312 (1974), a majority of this Court held that a student's imminent graduation from law school, rendered moot his challenge to admissions policies of the law school which were allegedly discriminatory. In *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), this Court held that a challenge to the practices of two state judges did not present an actual case or controversy because the petitioners were not facing imminent prosecutions for violations of state laws. In *Spomer* v. *Littleton*, 414 U.S. 514 (1974), this Court remanded an action against a state's attorney to the lower federal courts, for consideration of whether the appointment of a successor state's attorney rendered the case moot. In *Foley* v. *Blair & Co., Inc.*, 414 U.S. 212 (1973), this Court remanded a bankruptcy case to the lower federal courts to determine whether in light of the confirmation of Chapter XI arrangements involving a brokerage firm, there remained a live controversy concerning the appointment of a liquidator and the priority of attorney's fees. See also *Morgan* v. *Gilligan*, 413 U.S. 1 (1973) (Some basis exists for conclusion that case is moot due to changed circumstances, but case dismissed on grounds of non-justiciability of questions presented). But see *Richardson* v. *Ramirez*, 42 U.S.L. Week

5016 (June 24, 1974) (action challenging disenfranchisement of ex-felons is not moot, although three individual parties were subsequently permitted to register to vote); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974) (settlement of strike did not render moot the issue of whether striking employees were entitled to public assistance benefits); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) (challenge to zoning ordinance was not rendered moot by named parties moving to different residences).

In the instant case, we believe that a proper application of the principles enunciated by this Court, should have compelled the lower courts to have dismissed respondent's case as moot. At the time the District Court rendered its decision (October, 1973), respondent had been returned to Wallkill Correctional Facility, and had been there for ten months without any significant incidents. In his affidavit in support of dismissal on grounds of mootness, petitioner Butler affirmed that respondent would be treated "fairly", and would "not be subjected to any vindictive or retributive action as a consequence of his having been a party to this lawsuit" (223a). In addition, petitioner Butler caused a memorandum to be placed in respondent's file which explained the administrative nature of the transfer, and indicated that the transfer was not accompanied by disciplinary charges and was not to have any bearing on future determinations by the Board of Parole or the time allowance committee. While respondent later contended that the memorandum did not meet with his complete approval, this Court can determine for itself whether the memorandum was sufficiently neutral to obviate the need for further relief (See page 256a).

Finally, there were no outstanding disciplinary charges pending against respondent at the time the District Court rendered its decision, and no plans by petitioners to transfer respondent after the case was decided. Respondent

had been restored to his truck driving job at Wallkill, which is the job he held prior to the transfer, and he had not been subjected to any restrictions or loss of privileges as a result of the disputed events.

In light of these circumstances the lower courts should have dismissed the action as moot, particularly since the Court of Appeals decision was rendered six weeks after this Court's decision in *DeFunis* v. *Odegaard*. The issue in this case is not one that will evade review because there is currently a conflict in the lower federal courts concerning the procedures that must be followed in interstate and intrastate transfer cases. (See our petition for certiorari at pages 14-15). Moreover, as we have noted, the Court of Appeals has since decided in *Montanye* v. *Haymes, supra*, No. 74-520, that an inmate who is transferred between maximum security facilities is also entitled to a due process hearing.

The instant case is not a class action and involves only the rights of respondent Newkirk. Like the law student in *DeFunis* who faced only a remote possibility that he would be subjected to future admissions policies that allegedly violated his constitutional rights, respondent Newkirk was faced with only a possibility that at some future time, some unforeseen circumstances would warrant his removal to another institution. We do not believe that this was an adequate basis for granting relief on his behalf.

CONCLUSION

The decisions below should be reversed as a matter of law, or in the alternative vacated as moot.

Dated: New York, New York, December 10, 1974.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-107

PETER PREISER, Commissioner of Correctional Services of New York State,

and

HAROLD BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

v.

JAMES NEWKIRK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

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v.

JAMES NEWKIRK,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Whether a prisoner whose transfer from a medium to a maximum security institution in response to his conduct substantially alters the conditions of his

confinement is entitled as a matter of due process to notice and an opportunity to be heard.

2. Whether, given petitioners' failure to alter the practices that led to respondent's transfer leaving him subject to future summary transfer, and the possibility of future adverse consequences based on the initial transfer, this case can be deemed moot.

STATEMENT OF THE CASE

In July, 1972, this action was commenced in the district court by James Newkirk and three other New York State prisoners. The complaint alleged that on June 8 and 9, 1972, Newkirk and his co-plaintiffs were transferred by petitioners from Wallkill, a medium security institution, to various maximum security prisons without notice of charges and an opportunity to be heard, in violation of the Fourteenth Amendment. Plaintiffs prayed for declaratory and injunctive relief, including expungement from their prison records of any mention of the transfer. Shortly before trial, plaintiffs amended their complaint, adding the claims that their First Amendment rights were chilled and their right of access to the courts diminished by reason of their transfers, and that they were denied equal protection of the laws by being deprived of administrative hearings afforded inmates facing disciplinary punishments.

Trial commenced on November 27, 1972, and the district court heard extensive testimony from Newkirk and Cornelius Lucas, the remaining plaintiffs[1], and two

[1] Prior to trial, plaintiffs Carl Oliver and David Rodriguez were paroled and their cases were dismissed as moot.

other witnesses on their behalf. Petitioner Butler testified as did Walter Dunbar, a former Deputy Commissioner of Correctional Services. Depositions of various officials at Wallkill, and of one inmate, Warren Barnes, were also made part of the record.

The testimony focused on three areas: conditions at Wallkill and Clinton, the prisons involved in Newkirk's transfer; the events at Wallkill that precipitated the transfer; and the circumstances of the transfer itself.

Conditions at Wallkill and Clinton.

In the New York State prison system Clinton is classified a maximum security prson and Wallkill one of medium security (7 NYCRR § 00.15 and § 100.30). Wallkill does not receive men committed directly from the courts (A.195). Rather, inmaes attain admittance by achieving a good record at maximum security institutions and successfully conpleting a selection process which includes personal interviews (A.139, 195). More prisoners apply to Wallkill than can be accomodated; Newkirk was not accepted until six years after his application (A.139, 6-8)[2].

Once admitted to Wallkill, an inmate generally remains there for the balance of his sentence (A.139). In the year and a half prior to trial, only eighteen inmates were involuntarily transferred because of unsuitability for Wallkill (A.50). Most of these transferees received a hearing since as petitioner Butler

[2] During the six-year wait, Newkirk was interviewed several times by Wallkill officials and maintaned a good record at various maximum security prisons (A.6). He even applied for a transfer from one maximum security pison to another because he was told that this would facilitate his acceptance at Wallkill (A.7, 32).

stated, "if they are unsuitable, we usually bring disciplinary charges against them" (A.50). The transfer is entered on the inmate's prison record and considered by the Parole Board (A 143, 214; N.Y. Corr. Law § 214).

The district court found that the "advantages of [Wallkill] over other correctional facilities are numerous" and that conditions at Clinton "contrast strikingly with those in Wallkill." (Pet. for Cert. 41, 36). There are far fewer restrictions and physical restraints at Wallkill (A.47-49, 139, 143, 152-155). Unlike Clinton, it is without a solid outer wall, locked metal gates or barred cells (A. 10, 13, 16, 20, 47, 154, 178). Inmates live in rooms, the doors to which are not locked (A. 154-155). They are free to decorate their rooms and use them for socializing and are allowed free access to bathroom and shower facilities at the end of the floor (A. 16, 18-20). Wallkill is "completely open" until 11 P.M., and inmates may select activities and move unescorted about the institution (A. 47-48). At Clinton, Newkirk was not permitted such freedom of choice or movement (A. 16).

As explained in the descriptive pamphlet about Wallkill issued by petitioners, "the lack of physical and mechanical barriers are compensated for by more accurate classification, individualized treatment, good management . . . and development in the inmate of a sense of personal responsibility" (A. 123, 196). It further states that in "order to achieve the aims for which the Wallkill Correctional Facility was organized, an extensive program has been developed" (A. 196). Thus, the courts below found that Wallkill "gives access to numerous recreational and rehabilitative programs

not available at other state correctional facilities" (Pet. for Cert. 22). And Superintendent Butler testified that the object of Wallkill's programs is to prepare persons for their release from prison by developing individual responsibility, and to reduce the recidivism rate by teaching skills and techniques that are necessary for an inmate to succeed outside prison (A. 123-124).

While at Wallkill, Newkirk attended classes and received on-the-job training in auto mechanics, a vocation he intended to pursue upon release (A. 8-10). He also spent several hours daily practicing musical instruments, played in the band and engaged in art work (A. 13-16, 18). At Clinton, these activities were denied him, and despite his request for work as an auto mechanic or truck driver, he worked instead as a housekeeper for the prison superintendent on a seven day a week, fourteen hour a day schedule (A.11-13, 15, 18, 36, 40-41, 43).

Other conditions of Newkirk's confinement were markedly altered by his transfer. As Clinton is 300 miles from New York City, it became impossible for his family to visit him as they had at Wallkill located only 80 miles from the city (Pet. for Cert. 24). He was even unable to phone them as he had every two weeks at Wallkill (A.20-21). For the first thirty-three days after arrival at Clinton, he was denied every vocational, educational and recreational program, and was locked in his cell for twenty-three hours a day (A.10, 25, 36). For two months thereafter, he received wages amounting to half what he had earned at Wallkill (A.25, 36).

Events at Wallkill.

On June 2, 1971, during a period when inmates were allowed to freely congregate, authorization forms for an

inmate labor union were circulated and Newkirk was given one by Martin Sostre, a fellow inmate (A.26, 152, 156). Later that day, Newkirk signed the form and gave it to another inmate to return to Sostre (A.26-27). Newkirk had nothing further to do with the form and at no time did he participate in discussions or arguments about the union (A.27-29).

The forms were circulated openly and with the full knowledge of Butler and his staff (A.26-27, 54, 156). The circulation was neither violative of prison rules nor unprecedented (A.61, 71, 142, 167). It was not a matter of great concern to Butler or Lieutenant Connolly, the supervisor on duty (A.62, 156-157, 167).

There was little reaction to the circulation of the form until members of the Inmate Liaison Committee expressed "surprise" and "concern" (A.159-161, 165)[3]. To express their disagreement they requested use of the prison's public address system (A.54, 164-165). After approving the text of the announcement, Butler permitted it to be broadcast (A.63, 65, 77). The announcement included an invitation for those interested in further discussion to immediately assemble in a specified room (A.27, 171). The main concern of those who assembled was that the signers of the union forms would suffer reprisals from the prison administration (A.180-182). This gathering, which Newkirk did not attend, dispersed voluntarily and did not disrupt the routine of the prison (A.171-172).

[3]The Liaison Committee was a group of elected inmates who could present certain types of grievances to the administration. Members could be removed at will by Butler (A. 124-125, 128).

The Transfer.

Butler had left Wallkill prior to the circulation of the union forms on June 2 and did not return until June 5 (A.54-55). By the morning of June 7, he had decided to transfer five persons, including Newkirk (A.100-101, 110). He testified that the persons selected were those involved with the circulation of the union "petition" on June 2 and 3 who had remained very vociferous in support of the union on subsequent days (A.90-93, 100, 137). Butler did not personally know which inmates were continuing to "vocally support" the union, and Newkirk's assertion that he was not involved was uncontroverted by Butler or anyone else (A. 62, 64, 77, 84-85, 95-100).

In deciding whom to transfer, Butler relied on the recommendations of Assistant Superintendent O'Mara (A. 95-98, 208-211). O'Mara also had no first-hand knowledge, and listed for transfer those persons whom he believed active in circulating the forms on June 2 and 3 (A. 191-194). Butler received the list from O'Mara on June 6 (A. 94) and without speaking to him or anyone else decided to transfer the first five inmates listed, including Newkirk (A. 94-96, 113, 115, 136-137). It was soon discovered that at least one mistake had been made as a result of this process. Butler admitted on cross-examination that had a more careful investigation taken place concerning David Rodriguez, his transfer might not have occurred (A. 117).

On June 9, while Newkirk was engaged in his usual truck-driving routine, he was summoned to the prison hospital, where he remained confined in a small room

until his transfer later that day (A. 29-30).[4] The transfer, which was unaccompanied by any explanation, came as a complete surprise to Newkirk (A. 29-30). He had adjusted well to Wallkill, was participating fully in its programs and had an excellent disciplinary record (A. 23, 111-112). He had never been told that any aspect of his behavior was objectionable (A. 23, 39, 136), and Butler himself admitted that Newkirk had never created any problems at the institution (A. 23, 39, 134, 136).

At the close of trial, Newkirk and Lucas were returned to Wallkill, while the parties discussed settlement. Agreement was tentatively reached upon a consent order (A. 236). However, concluding that any such order would "stigmatize" Butler (A. 243), petitioners declined to sign a consent judgment and moved instead to dismiss respondent's case as moot.[5] Because petitioners refused to alter their transfer practices at Wallkill,[6] or concede that the failure to afford Newkirk an opportunity to be heard prior to his transfer had been erroneous, Newkirk adhered to his

[4] This was the usual procedure used in transferring an inmate from Wallkill. "[T]his procedure is followed to prevent inmates from barricading themselves in their cells or encouraging fellow inmates to assist them in preventing the transfer (A.53)." (Pet. Brief 13). Butler admitted that there are rooms or cells at Wallkill that can be locked and used to confine a disruptive inmate (A.139).

[5] Lucas' counsel agreed to the dismissal of his case since he had been paroled on February 22, 1973.

[6] There had been a number of summary transfers from Wallkill since Newkirk's return (A.228).

claim for declaratory and injunctive relief.[7] In addition, although petitioner Butler unilaterally placed a memorandum in Newkirk's file explaining the "entirely administrative" nature of Newkirk's transfer (A. 256), respondent sought a judicial decree ensuring that the transfer would not have future adverse consequences.[8]

On October 9, 1973, the district court rendered its decision granting Newkirk declaratory relief, holding that his interest in remaining at Wallkill was sufficiently great to require notice and an opportunity to be heard prior to transfer, and that transfers from Wallkill to maximum security institutions are used for disciplinary purposes (Pet. for Cert. 34-44).[9] The court's judgment of October 26, 1973 decreed that Newkirk could not be transferred in response to his activity without notice and an opportunity to be heard, that no adverse action be taken against him because of his transfer and that he be apprised of what behavior was permissible at Wallkill and the circumstances which, in petitioners' opinion,

[7] In an affidavit in opposition to petitioners' motion to dismiss the case as moot, Newkirk noted that shortly after his return to Wallkill he was threatened by a Deputy Superintendent with re-transfer and stated that his transfer had made him reluctant to engage in any conduct that might lead to another such transfer (226-227).

[8] Newkirk becomes eligible for parole in July, 1975.

[9] The court did not believe there was a sufficiently great threat of transfer at the time of its decision to warrant granting the injunctive relief sought by respondent (Pet. for Cert. 43). Also, because the court found that a violation of respondent's Fourteenth Amendment rights had occurred, it did not consider whether there had also been a violation of his First and Sixth Amendment rights.

would warrant his transfer to another prison (Pet. for Cert. 32-33)[10].

On June 3, 1974 the court of appeals affirmed the holding that Newkirk was entitled to minimal due process prior to transfer from a medium to a maximum security institution, but reversed as to the requirement that he be apprised of all the possible grounds that could lead to a transfer (Pet. for Cert. 21). In December, 1974, Newkirk was transferred from Wallkill to the Edgecombe Correctional Facility, a minimum security facility located in New York City and under the jurisdiction of petitioner Preiser.

SUMMARY OF ARGUMENT

I.

A prisoner is entitled to due process safeguards upon a major change in the conditions of his confinement resulting in grievous loss. *Wolff v. McDonnell*, 418 U.S. 539, n.19 (1974). Finding of the requisite loss in the instant case was based on significant deprivations suffered by James Newkirk in every major aspect of his confinement upon his transfer from Wallkill to a higher security institution. Petitioners' attempt to minimize these deprivations ignores New York's intent that lower

[10]After judgment had been entered, petitioners asked the district court to resettle its order to avoid any misconception that it applied to other than "disciplinary" transfers. The court denied the request, stating that the judgment was sufficiently clear and narrowly drawn.

security institutions such as Wallkill prepare inmates for a constructive life in society by affording significantly greater personal liberties and rehabilitative opportunities than maximum security prisons.

In objecting to the decision below, petitioners greatly exaggerate its scope and effect, and ignore their own present practices. Respondent takes no issue with the state's right to classify inmates for its various institutions, nor with its power to move them throughout the prison system. It is only when the state acts to deprive an inmate of the benefits of a medium security institution on the basis of his conduct that due process is required. It has been consistently recognized by this Court that deprivations based on findings about conduct require procedural safeguards. *E.g. Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). The lack of such safeguards in the instant case resulted in erroneous findings and unnecessary transfers.

Petitioners' contention that due process is only required when they choose to bring "disciplinary charges" against the inmate arbitrarily and irrationally discriminates among prisoners. As recognized by the court below, "Classification by label (e.g. as "administrative' or 'disciplinary') may facilitate prison administration but it cannot be used as a substitute for due process" (Pet. for Cert. 26).

Petitioners' further objections that affording due process prior to transfer may be detrimental to institutional security and will create an insurmountable administrative burden are without merit. Both New York State and the federal prison system presently require notice and a hearing for persons transferred in response to a wide variety of activities, with no

apparent difficulty. The holding below would require such procedures in few additional cases.

II.

The factors this Court has relied upon in finding mootness when declaratory relief is sought are not present here. There is a distinct possibility that Newkirk, still a New York prison inmate, will be subjected to another summary transfer to a higher security prison since petitioners have never indicated an intention to alter the practices which led to Newkirk's initial transfer or assured him that he would be afforded an opportunity to be heard prior to another transfer. Newkirk's awareness of his continuing vulnerability to summary transfer based on "mere rumor or surmise" has made him reluctant to engage in any conduct which might conceivably lead to another transfer and indicates that the past transfer by petitioners has a current impact upon Newkirk. Further, the fact that Newkirk's transfer to a maximum security prison, which is entered in his prison record and considered by the Parole Board, may result in adverse consequences in the future precludes a finding of mootness. Rather than being moot, this case presents an example of a situation in which declaratory relief is essential for in its absence Newkirk must act totally at his peril.

ARGUMENT

I.

A PRISONER WHOSE TRANSFER FROM A MEDIUM TO A MAXIMUM SECURITY INSTITUTION IN RESPONSE TO HIS CONDUCT SUBSTANTIALLY ALTERS THE CONDITIONS OF HIS CONFINEMENT IS ENTITLED AS A MATTER OF DUE PROCESS TO NOTICE AND AN OPPORTUNITY TO BE HEARD.

It is by now fundamental that imposition of grievous loss pursuant to governmental action requires due process safeguards. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Haines v. Kerner*, 404 U.S. 519 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Preiser v. Rodriguez*, 411 U.S. 475 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). In terms of prison life, grievous loss is understood as a major change in conditions of confinement. *Wolff v. McDonnell*, 418 U.S. 539, n.19 (1974).

Newkirk's transfer from Wallkill to Clinton was, by virtue of the vast differences between the two institutions, a most grievous loss under constitutional standards. The findings of the courts below established that life at Clinton, a maximum security institution, was substantially worse than at Wallkill, a medium security facility, in the following areas: (1) physical restraints, including barred cells, outside walls, armed guards and crowded conditions; (2) liberty of movement and amount of free time; (3) rehabilitative

opportunities, including vocational training in marketable jobs; (4) recreational and programmatic activities; and (5) basic amenities. Respondent's transfer also resulted in his placement in segregation for 33 days, an inability to continue training in auto-mechanics, a substantial reduction in wages, a total loss of family visits, and a potentially adverse effect on early parole release.

Finding of the requisite loss in the instant case was based, then, on significant deprivations suffered by Newkirk in every major aspect of his confinement. Where similar losses have occurred as a result of transfer to a higher security facility courts have uniformly held that due process is required. *Robbins v. Kleindienst*, 383 F. Supp. 239 (D.D.C. 1974); *Clonce v. Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974); *Walker v.* [illegible] ___ F. Supp. ____ (E.D. Mich. December 12, 19[illegible] *remand from* ____ F.2d ____ (6th Cir. September 26, 1974); *Stone v. Egeler*, 377 F. Supp. 115 (W.D. Mich. 1973); *Aff'd* ____ F.2d ____ (6th Cir. Nov. 15, 1974) *White v. Gilman*, 360 F. Supp. 64 (S.D. Ia. 1973)[11]. The National Advisory Committee on Criminal Justice

[11]The dicta from *Bundy v. Cannon*, 328 F. Supp. 165 (D.Md. 1971), cited in petitioners brief at 28, are based on the discredited "right-privilege" distinction. *E.g. Morrissey v. Brewer*, 408 U.S. 471 (1972). The fact that being placed at Wallkill is not a "right" does not eliminate the need for due process before removal. Moreover, once admitted to Wallkill an inmate generally remains until completion of his sentence or—as he is told—until he violates institutional rules; Newkirk had a legitimate expectation of remaining at Wallkill until release from custody. Cf. *Perry v. Sinderman*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Standards and Goals has also recommended that hearings be held when changes in custody levels are involved, recognizing that "decisions of this kind can have a critical effect on the offender's degree of liberty, access to correctional services, basic conditions of existence within a correctional system, and eligibility for release". [National Advisory Committee on Criminal Justice Standards and Goals, *Corrections*, Standard 2.13, at 54-55 (1973)].

Petitioners' attempt to minimize the deprivations suffered by Newkirk flies in the face of New York's intentional gradation of its penal institutions. Pursuant to this scheme[12], all adult male felons are initially committed to a maximum security institution such as Clinton[13]. These prisons fit the common stereotype of the penitentiary in terms of size, physical plant and regimentation of inmate life. It is the very limitation of such institutions in contributing to the rehabilitation of those in custody that has led New York to establish its

[12]7 NYCRR § 100.1 – 100.94.

[13]7 NYCRR § 103.1 – 103.40.

continuum of maximum security to lower security to parole status[14].

As a lower security institution, Wallkill's primary aim is to increase an inmate's chances for a constructive life in society by affording innovative programs designed to impart necessary skills, and by developing a greater sense of responsibility through exposure to a less restrictive, less coercive environment than exists in maximum security prisons[15]. The rigorous selection process for determining that only appropriate inmates

[14]As stated by New York State prison officials "regimentation and overcontrol in mass congregate facilities are in most cases not conducive to rehabilitative efforts, and at times might prove to be unnecessary and even a regressive influence on a particular offender". State of New York, *Multi-Year Master Plan of the Department of Correctional Services*, I-12 (April 1, 1973). Further, "[I]t has long been known to correctional administrators that maximum security is not necessary for many inmates and that to place inmates in a maximum security setting compounds the problem of operating rehabilitative programs . . ." State of New York, Select Committee on Correctional Institutions and Programs, *Report No. 2*, at 12 (March 15, 1972). The Select Committee pointed out the anomaly of the situation in New York State where 13,000 inmates are "in maximum security with all sorts of devices and procedures for security and prevention of escape, but one third of these will be paroled to release in the community each year." *Report No. 2* at 12. Copies of these reports are on file in the Clerk's office.

[15]"The continuum concept is based on the realization that the re-entry into the real world of family, friends and job and all the other pressures of daily life is actually the most crucial transition and test put to the offender." *Multi-Year Master Plan, supra*, n.14 at S-5. Also see American Correctional Association, *Manual of Correctional Standards*, 17-18 (1971).

are chosen for Wallkill evidences the importance attached by the state to placement at this facility. Thus, a move between Wallkill and a maximum security institution is a significant one for a New York inmate, and purposefully involves substantial differences in personal liberties and rehabilitative opportunities.

Petitioners' primary objection to the decision below is that due process requirements would interfere with "one of the most important tools of prison management . . . the power to decide which institution an inmate should be incarcerated in" (Pet. Brief 18). By framing the issue this broadly petitioners have argued to a question not presented by this case. Respondent takes no issue with the state's right to classify inmates for its various institutions nor with its power to move persons throughout the entire prison system. Further, as recognized by the courts below, transfers based on considerations of over-population, or budgetary and staffing constraints, as well as those that do not involve major changes in conditions, may be done summarily. It is only when the state acts to deprive an inmate of the benefits of a medium security institution because of his alleged conduct that some basic machinery to insure accurate fact-finding is required.

This Court has consistently held that where governmental action depends on findings of fact about an individual he or she must have some opportunity to be heard. *E.g. Morrissey v. Brewer*, 408 U.S. 471, 484 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Greene v. McElroy*, 360 U.S. 474, 496 (1959). Contrary to petitioners contention of inapplicability (Pet. Brief 19), due process procedures have been recognized as

uniquely adapted to ascertaining the accuracy of allegations about conduct[16].

The record underscores the importance of affording an inmate the right to be heard. Petitioner Butler admitted that as to one of the inmates transferred with Newkirk a mistake had been made, and that a more accurate investigation might have averted his transfer. The court of appeals noted that the decision to transfer Newkirk was itself premised on erroneous information in that it "was based only on third-hand reports prepared by officers who had not personally observed Newkirk's conduct, which, as it turns out, had apparently been limited to the single act of signing and passing along a union petition." (Pet. for Cert. 28).

Despite the factual predicate upon which Newkirk's transfer was based and the resultant loss to him, petitioners maintain that his transfer was not "disciplinary" but rather "administrative" requiring no due process. According to petitioners, a transfer is disciplinary only when preceded by the institution of formal "disciplinary charges" for violation of an institutional rule (Pet. Brief 25). Permitting due process rights to be labelled out of existence by prison administrators without regard to the harm involved or to the factors that precipitated the transfer guarantees arbitrary and

[16]Petitioners own concerns about avoiding assaults and disturbances–and damage actions (Pet. Brief 18-21)–would be diminished by procedures that minimize mistakes in fact-finding. Moreover, as this Court has noted, "fair treatment . . . will enhance the chances of rehabilitation by avoiding reactions to arbitrariness." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

irrational distinctions between inmates.[17] Indeed, as the court of appeals recently observed "After all these years of reviewing prison problems we are not too myopic to notice the distinct possibility of arbitrary, misguided or disingenuous invocation of administrative justifications for transfer." *Haymes v. Montanye*, slip op. 21, 27, n.4 (2d Cir. Oct. 4, 1974) *cert. pet. pending*, No. 74-520. And whatever the motive, the district court found in the instant case that transfer procedure at Wallkill, while termed "administrative", was as much a disciplinary measure as others for which a hearing is provided in the prison rules (Pet. for Cert. 42).

Petitioners' further objection that even minimal procedures prior to transfer may "be detrimental to institutional safety and security" is belied by their own practices (Pet. Brief 24). The usual transfer procedure at Wallkill, as followed in this case, is to first remove the inmate from general population and place him in one of the locked isolation rooms. If necessary, a hearing could be held at this stage without threat to institutional security. In fact, Butler acknowledged that most involuntary transferees from Wallkill are presently given notice of charges and a hearing, apparently without resultant difficulty.

[17]Respondent does not take issue with petitioners' need for different rules for different institutions, nor with their "prosecutorial" discretion to decide whether to charge a violation of those rules in any particular case. What is impermissible is to allow these decisions, based on penological and administrative considerations, to also define the scope of an inmate's constitutional rights.

The practice in the federal prison system is also instructive. Pursuant to a regulation covering all federal institutions, persons transferred in response to a wide variety of activities must be afforded due process.[18] The regulation lists 63 different activities, ranging from assault and escape, to refusing a program assignment and being unsanitary or untidy.[19] It requires at least 24 hour notice of charges, the services of a staff member to represent the inmate, the presence of the inmate at the hearing, the calling of witnesses, the preparation of a written record inculding the reasons for any sanctions and the evidence relied on, and three levels of appeal.[20]

These existing practices demonstrate that affording due process prior to transfer does not present real security problems.[21] Nor will it create "a formidable administrative burden." (Pet. Brief 22). During a year and a half period, only eighteen persons were

[18]Bureau of Prisons, Policy Statement: *Inmate Discipline, No. 7400*, 5C (10-4-74).

[19]*Id.* at 5-7.

[20]*Id.* at 10-11, 14. Contrary to petitioners' suggestion concerning disclosure of confidential information (Pet. Brief 25), respondent does not contest the balance struck by this Court in *Wolff v. McDonnell, supra*, and *Morrissey v. Brewer, supra*, when deciding how much process is due a convicted person prior to imposition of grievous loss.

[21]In emergency situations, even these procedures may be delayed until after transfer (Pet. for Cert. 29). The existing practices in New York State and federal prisons also demonstrate that the relevant statutes in these jurisdictions do not require summary transfers, or even indicate that they are preferable as suggested by petitioners (Pet. Brief 22-23).

involuntarily removed from Wallkill, and most of them were afforded hearings. Given the small number of transfers which would be affected by the holding below,[22] and the existence of hearing mechanisms in all facilities which presently handle large numbers of disciplinary infractions, petitioners would not be burdened by affording minimal due process.

II.

THIS CASE IS NOT MOOT BECAUSE WITHOUT THE JUDGMENT BELOW, NEWKIRK WOULD REMAIN AFFECTED BY PETITIONERS' POLICY OF SUMMARY TRANSFER AND MIGHT SUFFER ADVERSE CONSEQUENCES BASED ON HIS SUMMARY TRANSFER.

In determining mootness, this Court has deemed the following factors relevant: 1) the likelihood that the plaintiff will be subject to a repetition of the action complained of;[23] 2) the existence of current and continuing injury as a result of defendant's past conduct;[24] and 3) the risk that the past conduct will

[22]The large numbers cited by petitioners are misleading since only a small fraction of those represent prisoners involuntarily and summarily removed to a higher security institution (Pet. Brief 22).

[23]*E.g., DeFunis v. Odegaard*, 416 U.S. 312 (1974); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972); *United States v. W.T. Grant*, 345 U.S. 629 (1953).

[24]*E.g. Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *Powell v. McCormack*, 395 U.S. 486, 496-500 (1969); *Carroll v. President & Commissioners*, 393 U.S. 175 (1968).

have future collateral consequences.[25]

With respect to repetition of the conduct complained of, the instant case stands in striking contrast to *DeFunis v. Odegaard*, 416 U.S. 312 (1974). There, this Court held that petitioner's claim was moot because regardless of the resolution of the merits, respondent assured the Court that petitioner would be permitted to complete his law school education. In this case, there has never been any assurance to Newkirk that he would be afforded an opportunity to be heard prior to a transfer to a higher security institution based upon his conduct. Instead petitioners have consistently maintained, as evidenced by their refusal to sign a consent decree, that Newkirk's summary transfer was proper, and they have never indicated an intention to alter their practices with respect to this type of transfer. It was this continued adherence to past policy that justified the court of appeals' conclusion that "even after his return [Newkirk] remained subject to a new transfer at any time based on mere rumor or surmise which he had no opportunity to answer or refute" (Pet. for Cert. 30).[26]

With respect to continuing injury, a finding of justiciability in this case follows from *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 124 (1974)

[25] *E.g. North Carolina v. Rice*, 404 U.S. 244 (1971); *Sibron v. New York*, 392 U.S. 40 (1968); *Papish v. Board of Curators*, 410 U.S. 667 (1973), *rev'ing on the merits* 464 F.2d 136 (8th Cir. 1972).

[26] Indeed, subsequent to Newkirk's return to Wallkill there were a number of summary transfers, and he himself was threatened with re-transfer by an assistant superintendent. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

where, despite the cessation of the conduct in controversy, the challenged governmental action continued to affect "every existing collective-bargaining agreement and [was] a factor lurking in the background of every incipient labor contract". Newkirk's attested to reluctance to engage in conduct that might lead to another summary transfer is based upon petitioners' prior actions and their continuation of the policy which led to his initial transfer. Butler's promise to treat Newkirk "fairly" and without "vindictiveness" is far too vague to be of comfort to him particularly since petitioners have always maintained that they treated him fairly. Absent a declaration of his rights with respect to petitioners, Newkirk would be required to act at his peril.

This existence of potentially adverse consequences to Newkirk's chances for parole as a result of his transfer also renders this case viable. See *Sibron v. New York*, 392 U.S. 40 (1968); *Carroll v. President and Commissioners* 393 U.S. 175 (1968). Because the transfer has not been expunged, his prison record continues to reflect petitioners' conclusion that it was necessary that he be returned to a maximum security prison. This record will be transmitted to the Parole Board when Newkirk becomes eligible for parole in July, 1975. By statute, the Board must consider Newkirk's conduct in prison and the extent to which he has responded to rehabilitative efforts (N.Y. Corr. Law §214). His return to a maximum security institution can only detract from the Parole Board's estimation of his suitability for release.

The court of appeals did not believe Butler's mere placement of a letter in Newkirk's file stating that

adverse conclusions should not be drawn from the transfer was sufficient protection. That assessment was correct because whatever Butler's good faith intendment towards Newkirk may be, other officials are free to disregard his suggestion when making decisions affecting Newkirk.[27]

In closing, we would emphasize that the relief granted in this case was declaratory only. As this Court has noted, a primary purpose of the Federal Declaratory Judgment Act is to avoid the necessity "of having to act at one's peril . . ." by enabling an individual to secure a judgment as to his rights and duties before an actual injury has occurred. *Perez v. Ledesma* 401 U.S. 82, 111-112 (1971) (Brennan, J., separate opinion); *Steffel v. Thompson,* 415 U.S. 452, 478 (1974) (Rehnquist, J., concurring). Newkirk is so situated, and declaratory relief is essential to clarify his rights.

[27]Newkirk's recent transfer to the Edgecombe Correctional Facility in New York City also does not moot the controversy since at Edgecombe respondent is still subject to petitioner Preiser's control and can be transferred by him back to Wallkill or to one of the state's maximum security prisons at any time. Cf. *Brockington v. Rhodes,* 396 U.S. 41, 43 (1961); *Henderson v. United States,* 339 U.S. 816, 823 (1950).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-107

PETER PREISER, *ET AL.*,

Petitioners,

v.

JAMES NEWKIRK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR AMICI CURIAE THE NATIONAL PRISON PROJECT AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-107

PETER PREISER, *ET AL.*,
Petitioners,

v.

JAMES NEWKIRK,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR AMICI CURIAE THE NATIONAL PRISON PROJECT AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

INTEREST OF AMICI CURIAE

The National Prison Project of the American Civil Liberties Foundation, Inc., is a non-profit, tax-exempt New York corporation, engaged in efforts, through staff attorneys and other employees, to develop rehabilitative and other programs and facilities, devise model prison procedures and regulations, and otherwise to improve prison conditions in the United States.

In furtherance of the activities described above, the Project's staff attorneys and other employees are engaged in the counseling and representation of prisoners incarcerated in penal institutions throughout the country. The Project has been involved in many important cases with issues similar to those in the case at bar. Eg. *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974); *Robbins* v. *Kleindienst*, 383 F. Supp. 239 (D.D.C. 1974); *Clonce* v. *Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974).

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation formed under the laws of the State of New York in 1939.

A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon black people and upon the poor, deprived and friendless, who too often are black. To further this purpose, the Fund in 1967 established a separate corporation, the National Office for the Rights of the Indigent (N.O.R.I.), having among its objectives the provision of legal representation to the poor in individual cases and the advocacy before appellate courts of changes in legal doctrine which unjustly affect the poor.

In 1970 the Fund received a foundation grant for the purpose of promoting efforts toward prison reform. The grant contemplates that the Fund will do research to identify the most serious and fundamental problems in corrections and will bring test litigation or suggest administrative or legislative reform where appropriate.

The Fund has been involved in many important prison cases in different states. The issues presented in those cases cover a broad spectrum of the difficulties faced by prisoners in realizing their fundamental rights as American

citizens. E.g., *Procunier* v. *Martiñez*, 416 U.S. 396, 94 S.Ct. 1800 (1974); *Haines* v. *Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972); *Gomes* v. *Travisono*, ___F.2d ___, Civil Action No. 73-1065 (1st Cir. 12/20/74), on remand, ___ U.S.___ , 42 U.S.L.W. 2709 (7/8/74).

SUMMARY OF ARGUMENT

The only issue before the Court with which this brief is concerned is what process, if any, is due prisoners who suffer grievous losses as a result of their transfer from one prison to another. *Amici* contend that such prisoners are entitled to "those minimum procedures appropriate under the circumstances and required by the Due Process Clause," *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 2975 (1974). In addition, these procedures are essential to "the integrity of the Administrative process," *Atchison, Topeka and Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 807 (1973). *Amici* contend that both constitutional law and administrative law support the opinion of the lower court which, therefore, ought to be affirmed.

ARGUMENT

I. THE TRADITIONAL AND RUDIMENTARY ELEMENTS OF PROCEDURAL DUE PROCESS DEFINED IN *WOLFF* v. *McDONNELL* ARE APPLICABLE TO PRISON TRANSFER PROCEEDINGS THREATENING GRIEVOUS LOSSES.

This Court has repeatedly held that a due process hearing is necessary before the government may act in a way injurious to private interests whenever "the nature of the interest [jeopardized by governmental action] is one

within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971). Involuntary transfers directly and indirectly compromise the most fundamental prisoner interest there is – the interest in personal liberty and freedom from incarceration. Such transfers also abridge other interests that are of critical importance including the ability of prisoners to enjoy the basic entitlements of prison life and to participate in programs of rehabilitation. These important interests are of "real substance" and are "sufficiently embraced within Fourteenth Amendment 'liberty' to entitle [the prisoner] to those minimum procedures appropriate under the circumstances and required by the Due Process Clause . . . ." *Wolff* v. *McDonnell*, *supra*, 94 S.Ct. at 2975; *Morrissey* v. *Brewer*, *supra* at 481.

If the interests are found to be constitutionally protected, as *Amici* contend that they are, the question becomes not whether due process applies, but what process is due. The analysis of the scope and content of the process due before that interest may be compromised "must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 887, 895 (1961). The State of New York argues that transfer is a classification device (Petitioner's Brief at 16) that is immune from the requirements of due process. It is a maxim of Constitutional law, however, that the touchstone of due process is protection of the individual from arbitrary government action, *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889), and it is the effect,

rather than the nomenclature assigned to such action that is determinative.[1]

No legitimate state interest dictates that any of the minimum requirements of due process be abrogated. Indeed, it is in the interest of the state to assure that prisoners facing the losses which inevitably result from such transfers have first been afforded due process. The potential for a prisoner's rehabilitation will be maximized if he is treated fairly. Conversely, tension born of resentment will be encouraged by state officials when they refuse to treat prisoners fairly.[2]

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[1] In a post-*Wolff* decision concerning long-term segregation, the U.S. District Court for the District of Massachusetts stated: "The proceedings in this case wer edenominated classification hearings . . . . It is necessary to look behind lables as to the operative effect of the proceedings. It would appear from the exhibits that in prison administration, 'positive' euphemisms are endemic." *Daigle* v. *Hall*, __ F. Supp. __, Civil Action No. 74-4783-5 (D.Mass. 12/20/74). A copy of this as yet unreported decision is on file in the Clerk's office.

[2] David Fogel, Director of the Illinois Law Enforcement Commission and former Commissioner of the Minnesota Department of Corrections, explained the vital necessity of treating prisoners with fairness and justice:

> The justice model seeks to engage both the keeper and the kept in a joint venture, which would force the agencies of justice to operate in a lawful and just manner. It simply means a belief that the prisoner did not use lawful means outside the prison and should therefore be provided more (not fewer) opportunities to learn lawful behavior in the institution. The efforts of the staff should be geared to teaching a prisoner how to use lawful processes to achieve his ends, as well as to accept responsibility for the consequences of his behavior. In the absence of a continuum of justice in the

(continued)

The flexible nature of procedural due process allows legitimate state interests to be protected without sacrificing the procedural protections which are essential to accurate fact-finding. These protections include the right to written notice of charges and disclosure of the basis for the proposed transfer, the opportunity to be heard in person and to present witnesses, the right to confront and cross-examine adverse witnesses, the right to representation by counsel or counsel-substitute and the right to a written decision by an impartial hearing tribunal.

The Court's landmark decision of *Wolff* v. *McDonnell* has served as the guidepost for at least two United States Courts of Appeals and three United States District Courts

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[2] (continued)

> prison, most ends are reached unlawfully. When unlawful behavior in the prison is detected, the standards of due process that we insist upon outside the prison are not applied. The result is a further indication to the convict that lawful behavior for a convict has little payoff. He can be dealt with arbitrarily and usually responds by treating others in the same manner. The justice model would make sure that the prisoner experienced lawful ways of dealing with problems with the expectation that there would be a carryover to the point of release. The prison experience would try to guarantee that at least for the period of incarceration the prisoner would be exposed to the type of lifestyle that society expects him to pursue when he is released.
>
> Fogel, *The Justice Model for Social Work in Corrections*, Social Work Practice and Social Justice, 26, 32 (N.A.S.W. 1972).

Commentators as well as penologists have recognized this principle. "It is submitted that one of the most disruptive influences upon the rehabilitative scheme is the belief that the law is arbitrary." Comment, 33 U.Pitt. L.Rev. 638, 642-43 (1972).

which have since issued opinions concerning prisoner transfers. *Gomes* v. *Travisono*, ___F.2d ___, Civil Action No. 73-1065 (1st Cir. 12/20/74), on remand, ___ U.S. ___, 42 U.S.L.W. 2709 (7/8/74); *Stone* v. *Egeler*, ___F.2d ___ Civil Action No. 74-1256 (6th Cir. 11/15/74); *Walker* v. *Hughes*, ___F. Supp. ___, Civil Action No. 39765 (E.D. Mich. 12/12/74), on remand, ___F.2d ___ (6th Cir. 9/26/74)[3]; *Robbins* v. *Kleindienst*, 383 FSupp. 239 (D.C. D.C. 1974); *Clonce* v. *Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974). Each court has found that the principles of due process as applied in *Wolff* should apply with equal force to prisoners who will suffer grievous losses as a result of their transfer from one prison to another.

Each of the post-*Wolff* transfer cases concerned to some extent the plight of a prisoner who, like Respondent Newkirk, had not been transferred for "disciplinary" reasons, but who suffered grievous losses nonetheless because of the inherently punitive aspects of the transfer process. As required by *Wolff*, *supra* and *Morrissey*, *supra*, each court based its decision on a careful analysis of the nature of the losses suffered by the prisioner, rather than on the stated purpose of or the label affixed to the proposed transfer. The First Circuit found that

> [s]ince the disadvantages to the inmate flowing from an interstate transfer are substantial, whether it be characterized as punitive, administrative, or rehabilitative, the same safeguards should be available in all such cases. *Gomes* v. *Travisono*, *supra*, slip opinion at 7.[4]

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[3] Copies of the as yet unreported decisions in *Stone* v. *Egeler*, *Gomes* v. *Travisono*, and *Walker* v. *Hughes* are on file in the Clerk's office.

[4] Prisoners in *Gomes* were transferred from the Rhode Island prison system to various state and federal prisons outside Rhode Island.

The *Walker*, *Clonce*, and *Robbins* decisions were less concerned with the fact that the transfers were interstate, than with identifying the losses resulting from the transfers, according to the rationale of *Wolff*, *Morrissey*, and *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Each decision, like that in *Gomes*, reached the same conclusion as *Wolff*, and as *Newkirk*: "minimum procedural safeguards [are necessary] as a hedge against arbitrary determination of the factual predicate for imposition of the sanction." *Wolff* v. *McDonnell*, *supra*, 94 S.Ct. 2982, n. 19.

Each court reached that conclusion after finding that involuntary transfers, whether categorized as "disciplinary" or as "classification,"[5] resulted in loss of personal property, legal papers, and medical records; delay in parole hearings or denial of parole; placement in "administrative" segregation upon arrival at the receiving prison which was no less restrictive than "disciplinary" segregation[6]; loss and

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[5] "It is not always easy to distinguish discipline from treatment, since the goal of each is to induce the inmate to refrain from further infractions of the rules." *Daigle* v. *Hall*, *supra* at 10. Also see *Kessler* v. *Cupp*, 372 F.Supp. 76 (D.Ore. 1973).

[6] The receiving prison officials, who often do not receive adequate records from the sending prison, not surprisingly insist on a period of quarantine or administrative segregation, sometimes for months on end, which, to the inmate, is no different from any other kind of punitive confinement. In *Gomes* v. *Travisono*, *supra* 490 F.2d at 1213, the transferred prisoner would have been entitled to notice and hearing before any comparable intraprison change in living situation, whether or not it resulted from disciplinary action. See, e.g. *Morris* v. *Travisono*, 310 F.Supp. 857 (D.R.I. 1970). Nevertheless, one inmate who was transferred out of Rhode Island was kept in segregation for his entire stay at the receiving institution. (continued)

diminution of correspondence and visiting opportunities; change, and often loss, of program opportunities; the delay and often the denial of statutory entitlements, such as good time credits, furloughs and work-release programs. All of these losses have been described in the transfer cases cited by the lower court opinions in *Preiser* v. *Newkirk*, as well as in the post-*Wolff* transfer cases.

Judicial recognition of these privations as protected interests reflects an application of the "accepted due process analysis as to property and liberty" in the prison context and, thus, the developing nature of the law. *Wolff* v. *McDonnell*, *supra*, 94 S.Ct. at 2975. In one such analysis, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), this Court recognized that Roth had an interest in preserving his good name, reputation, honor and integrity, as well as his unimpaired ability to seek other employment opportunities. The Court, citing to *Morrissey* v. *Brewer*, *supra*, held that those interests came within the protection of the Fourteenth Amendment. Certainly the nature of involuntary transfers, whether they are called disciplinary or not, invariably affects these as well as a significant number of other fundamental interests. Transfers imply, for example, that the transferred prisoner has acquired a bad reputation, that he is an agitator or a troublemaker of some sort and that he is not to be trusted.[7] Second, transfers imply that whatever the prisoner's involvement in vocational or educational programs at the sending prison had

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[6] (continued)
Subsequently he was returned to Rhode Island, held in segregation for 10-12 days, and then transferred to a third state where he was also segregated. All of this occurred without notice or hearing. Respondent Newkirk was also held in administrative segregation as a result of his transfer.

[7] See, *Gomes* v. *Travisono*, *supra*, 490 F.2d at 1213.

been, the involvement was not sufficiently important to outweigh the prison's need to rid itself of him. Thus, the prison administrator's ability to impair the prisoner's educational, vocational and employment opportunities by means of transfer is potentially unlimited.[8]

Petitioner admits as much in his brief but reaches the conclusion that while "intangible considerations. . . cannot be the basis of disciplinary punishment, they should be the basis of allowing a warden to decide whether an inmate should remain at an institution." Petitioner's Brief, at 25. Such an argument springs from a philosophy that places correctional expertise above the law, and that sees no need for procedures to guide the administrator in the exercise of his power. This Court has rejected that position repeatedly. See, e.g., *Procunier* v. *Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 1813-14 (1974). Furthermore, it is difficult to understand how the Court could extend Constitutional protection to Roth's honor and integrity and not to the more tangible interests affected by transfers.

Amici contend that the prisoner's interests affected by an involuntary transfer are protected by the Constitution whether the transfer be inter-state or intra-state. Since the Court has before it the record of an intra-state transfer only, the Court should be aware that inter-state transfers encompass all of the grievous losses accompanying intra-state transfers as well as losses unique to interstate transfers. For example, in *Gomes* v. *Travisono, supra,* Rhode Island prision officials testified that when they transferred prisoners into either another state or into the federal prison system, the receiving prison system had exclusive authority to determine the place of incarceration.

[8] See, *Hoitt* v. *Vitek*, 361 F.Supp. 1238 (D.N.H. 1973).

The Rhode Island officials therefore testified that they did not attempt to learn anything about receiving prisons and in fact would usually know nothing about them. Thus, "[o]ne black inmate was transferred to a prison with an entirely white population and had to be locked up in protective custody to stop his harassment by white inmates." *Gomes* v. *Travisono,* 353 F.Supp. 457, 463 (D.R.I. 1973).

Transfer into a foreign prison system usually guarantees that the prisoner's access to his parole board and to his state's unique system of prisoner entitlements will be diminished. *Gomes* v. *Travisono, supra,* 490 F.2d at 1213. Finally, inter-state transfer affects the prisioner's rights to petition elected officials for redress of grievances since officeholders possess neither the authority nor the inclination to inspect prisons outside their states. The right to petition for redress of grievances is traditionally associated with closeness to the seat of government. *Edwards* v. *California,* 314 U.S. 160 (1941); *Crandall* v. *Nevada,* 73 U.S. 35, 44 (1867). In fact, the Habeas Corpus Act of 1679, 31 Car. II, C.2, which prohibited the involuntary removal of prisoners to another county, much less another country, was passed in reaction to the British practice of "transporting" prisoners as a substitute for execution.[9]

[9] Wasserman, *Deportation and Exile,* Encyclopedia Britannica, Vol. 7, 266 (1963); Habeas Corpus in the Colonies, 8 Am.Hist.Rev. 18 (1903). The 1679 Act was specifically embraced by virtually all of the new states. See generally R. Hurd, A Treatise On the Right of Personal Liberty and on the Writ of Habeas Corpus. 111-113, 137 (1858).

II. THE RULE OF ADMINISTRATIVE LAW AND THE CONSTITUTION BOTH REQUIRE THE PROVISION OF A PROCEDURALLY FAIR HEARING PRIOR TO AN INVOLUNTARY TRANSFER.

In addition to the constitutional right to due process, the prisoner is also protected from arbitrary exercises of governmental power by what Judge Leventhal of the United States Court of Appeals for the District of Columbia Circuit has called the "Rule of Administrative Law."

> The Rule of Administrative Law embraces the 'simple but fundamental' requirement that an agency or official set forth its reasons, *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196-7 (1947), a requirement that is essential to 'the integrity of the Administrative process.' *Atchison, T & S.F.R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 807 (1973), for it tends to require 'the agency to focus on the values served by its decision . . . hence releasing the clutch of unconscious preference and irrelevant prejudice.' *Greater Boston TV Corp. v. FCC*, 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852 (1970) *cert. denied*, 403 U.S. 923 (1971). *Childs* v. *Board of Parole*, Civil Action No. ___, ___ U.S. App. D.C. ___, ___ F.2d ___ (12/19/74) (Leventhal, concurring, slip opinon at 2).[10]

In *Childs*, the Court of Appeals affirmed, on constitutional grounds, the lower court decision requiring the

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10 A copy of the as yet unreported decision in *Childs* v. *Board of Parole* is on file in the Clerk's office.

United States Board of Parole to give prisoners written reasons when denying them parole. By denying parole, the Board continues prisoners in their confinement and thus maintains their status quo, and is required by the Constitution and by the Rule of Administrative Law to provide prisoners with reasons for the continuation of their status. (The Board's own regulations require individual hearings prior to parole determination.) Yet petitioners argue that a transfer which produces a radical change in a prisoner's status quo by forcing him to endure more onerous and more restrictive conditions of confinement, need not be preceded by reasons, much less by a hearing. Such a position is not only paradoxical, it is contrary to the law. It is indicative of the need for a procedure which forces petitioners to "focus on the values served by its decision." *Greater Boston T.V. Corp.* v. *FCC*, *supra*. Also see, *Environmental Defense Fund* v. *Ruckleshaus*, 439 F.2d 584, 598 (D.C.Cir. 1971) and cases cited therein.

III. THE STATE OF NEW YORK CANNOT SHOW A SUFFICIENT INTEREST TO JUSTIFY TRANSFERRING PRISONERS ABSENT PRIOR, DUE PROCESS HEARINGS.

Until October 1974, the Federal Bureau of Prisons, like the Corrections Department of the State of New York, did not provide transfer hearings to its prisoners. However, the Bureau had been in the process of revising its disciplinary regulations to comply with the Court's decision in *Wolff* v. *McDonnell*, when two post-*Wolff* decisions were issued that concerned transfer. In *Clonce* v. *Richardson*, *supra*, and *Robbins* v. *Kleindienst*, *supra*, both courts decided that the Bureau of Prisons was responsible for providing notice and hearings comporting with the standards

enunciated in *Wolff*, to prisoners whose conditions of confinement would be substantially altered by a transfer.

As in Newkirk's case, all of the prisoners in *Robbins* were transferred from lesser to higher security prisons, some for disciplinary reasons, others for "adjustment" reasons, but all without benefit of any notice, much less an opportunity to respond. In *Clonce* v. *Richardson*, each of the federal prisoners was transferred to a behavior modification program in which the conditions of confinement were more restrictive than those of the segregation units from which the plaintiffs came. These prisioners, too, were denied any opportunity to challenge the reasons for which they were transferred. The Federal Bureau of Prisons has not appealed either decision[11] but, rather, has chosen to incorporate the *Wolff* standards into its operating procedures. Thus the federal Inmate Discipline regulation[12] specifically provides for equivalent notice and hearing procedures if the infraction under study might result in either segregation or transfer. In cases of emergencies, the regulation provides for hearings to be held soon after the transfer has been effectuated. One need not reach the merits of the Federal Bureau's transfer regulation to conclude that transfers do lend themselves to traditional due process procedures, that the need for summary disposition does not void the ability to provide due process, and that while transfers may be a "routine concomitant of prison life"[13]

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[11] The Department of Justice filed a notice of appeal in *Clonce* which it has withdrawn.

[12] Federal Bureau of Prisons Policy Statement, *Inmate Discipline*, No. 7400.5C (10/4/74).

[13] Brief for Petitioners, 16-17.

they can and must be accompanied by due process because of their inevitable effects upon the prisoner.[14]

Finally, petitioner argues that providing notice and hearing prior to transfers would endanger security, would be administratively unmanageable, and would not allow prison administrators sufficient flexibility in their exercise of authority. These are certainly factors which the Federal Bureau of Prisons considered prior to adopting the regulation referred to. Further, before the Bureau of Prisons issued its regulation, it followed its practice of providing the wardens of its prisons the opportunity to comment upon its rationale as well as its provisions.

Although the New York Corrections System is extensive, it is far exceeded in size and complexity by the federal prison system. Thus the persuasiveness of petitioner's arguments as to the administrative impossibilities posed by the introduction of due process into transfer decisions diminishes significantly in light of the Bureau's decision that transfers must be effectuated according to the mandates of *Wolff*.

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[14] In addition to the federal prison system, several state prison systems have adopted a notice and hearing procedure prior to transfer. See e.g. *Croom* v. *Manson*, 367 F. Supp. 586 (D. Conn. 1973). Also see National Advisory Commission on Criminal Justice and Goals: *Corrections* (1973), Standard 2.13, Procedures for Nondisciplinary Changes in Status, 54-55.

CONCLUSION

For the reasons stated above, *Amici* pray that the decision below be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

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PETER PREISER, ET AL., PETITIONERS

v.

JAMES NEWKIRK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-107

PETER PREISER, ET AL., PETITIONERS

v.

JAMES NEWKIRK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will address the question whether the Due Process Clause always requires notice and opportunity for hearing before a prisoner may be transferred from one place of incarceration to another.[1]

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[1] When this Court granted certiorari, it directed the parties to brief the question of mootness. We do not address that issue in this brief.

INTEREST OF THE UNITED STATES

This case presents questions regarding the procedures prison administrators must follow when deciding to move inmates from one place of incarceration to another. Although the case involves directly only the practices of prisons in a single State, the Court's decision on the constitutional question will have a direct impact on the existing practices and procedures for management and control of inmates in all other prison systems, including the federal prison system.

In accordance with the statutory mandate to operate "an integrated system" of institutions to "assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions" (18 U.S.C. 4081), the Federal Bureau of Prisons presently maintains 49 prisons of various types throughout the country.[2] In addition to these prisons it maintains numerous halfway houses and has contracts with state or private insti-

[2] These consist of six maximum security institutions, six intermediate term adult institutions, thirteen short term adult institutions, seven young adult institutions, three juvenile facilities, four institutions for female offenders, nine community treatment centers, and one intensive medical treatment facility. In addition, the Bureau of Prisons administers prison programs, differing from one institution to another, according to the needs of the inmate populations.

tutions for temporary custody of prisoners and for specialized remedial programs.

In fiscal 1974, 13,445 individuals were committed by the federal courts to the custody of the Attorney General and underwent classification study.[3] After this study is completed, each individual is sent or transferred on an initial basis to the institution deemed most appropriate for him or her. In addition to these "initial" classification and transfer decisions, approximately 11,306 inmates were transferred during the year from one federal prison to another.[4] Decisions similar to transfer decisions are made when individuals are placed in, or removed from, facilities operating under contract with the Bureau. During the year 10,130 prisoners were released on furloughs (some to contract facilities), and 9,766 prisoners were received back into prisons from furloughs. Finally, prisoners routinely are transferred within the same penal institution or assigned to different work or rehabilitation programs; many of these decisions have consequences to the inmate similar to those experienced when he is transferred between institutions.

[3] This statistical information has been provided by the Bureau of Prisons. Although 13,445 individuals were formally committed, a total of 17,146 individuals were received in the federal prisons from all sources, and classification reports would have been prepared on each of them.

[4] These transfers involved a substantial proportion of the total inmate population of approximately 23,000. Approximately 770 of the transfers were effected because the inmate had not adjusted to an institution, and 570 were to provide "closer custody".

Resolution of the issues in this case may have a substantial impact on the procedures that must be used to effect these initial classification, transfer, and assignment decisions,[5] and a ruling requiring all prison transfer decisions to be made according to a particular set of rules or an inflexible mold may both seriously interfere with the orderly administration of federal prisons and inhibit the continuing development and revision by the Bureau of its transfer procedures.[6]

STATEMENT

On July 5, 1972, respondent and three other inmates in the New York State prison system brought an action under 42 U.S.C. 1983 seeking declaratory and injunctive relief from allegedly unconstitutional treatment arising when they were transferred from Wallkill Correctional Facility, a medium security New York State prison, to maximum security prisons also located in and operated by New York State. The complaint, as amended, asserted that the transfers were defective because they had been carried out without written notice of charges and without a hearing before an impartial tribunal at which they would have the right to call and confront witnesses and be represented by counsel. The complaint also asserted that the transfers violated the Equal Protection Clause because the transferred prisoners had not been afforded the same administrative procedures granted to inmates who faced disciplinary punishment within the prison. Finally, the complaint alleged that the transfers were punishment imposed solely because of the exercise of First and Sixth Amendment rights. The complaint sought a declaratory judgment that the transfers were improper, an injunction ordering their return to Wallkill, expungement from their prison records of all references to the transfer, and the prohibition of future transfers without an adequate hearing.

1. At a trial held in November 1972, respondent testified that he had been an inmate of the New York prison system since his conviction for second degree murder in 1962 and that he had been held in four different state correctional facilities prior to his transfer to Wallkill, a unique prison that permits its inmates to live in rooms rather than cells and provides "maximum free time and freedom of movement" (Pet. App. 21-22).[7] At Wallkill respondent took instruction in automobile repair, attended classes in mathematics, history and English, and during his leisure time was able to play musical instruments

[5] Congress has enacted numerous statutes providing for the classification and transfer of prisoners within the federal system. Those statutes, the application of which could be affected by the Court's decision in this case, are set out in Appendix A, *infra*.

[6] The Bureau has developed comprehensive procedural guidelines for classification and transfer decisions, including transfers used for disciplinary purposes. These guidelines are not generally available, and we have, therefore, set them out in Appendices B-E, *infra*.

[7] This summary of facts is taken from the opinion of the court of appeals.

and pursue other artistic interests. Respondent also drove a truck and was, at times, permitted to leave the prison grounds as part of his employment.

Some time prior to June 1972 several Wallkill inmates began circulating petitions to form an inmates' union. Respondent testified that he became interested in the concept of the union and signed a union constitution on May 31, 1972, and a union petition on June 2, 1972. However, he stated that he had no further contact with the union prior to his transfer from Wallkill on June 8, 1972.

The circulation of petitions to form a union was opposed by members of the elected Inmate Liaison Committee, which had general responsibility for processing inmate grievances. On June 2, 1972, the Committee held a meeting of inmates at which it disclaimed any support for the union. The discussions at this meeting, although vociferous, did not lead to violence. Nevertheless, the officer in charge of Wallkill on that evening became concerned about a possible threat to the stability of the prison and telephoned reports to Prison Superintendent Butler, a petitioner here. The officer also prepared a written report for the Assistant Deputy Superintendent in which, based on what other officers had told him, he identified respondent as one of the inmates who had been canvassing for the union. On Tuesday, June 6, the Assistant Deputy Superintendent recommended to Superintendent Butler that eight inmates, including respondent, be transferred from Wallkill.

Superintendent Butler agreed, and the transfers

were made on June 8 and 9. The eight inmates were not told the reason for the transfer, nor were they afforded any opportunity to respond to charges or to contest the action. Respondent was transferred to Clinton Correctional Facility, an institution slightly more "secure" than Wallkill.[8] At Clinton he was placed in a cell openable only by a guard and was unable to engage in many of the activities he had pursued at Wallkill. Respondent testified that at Clinton he worked seven days a week, often for 13 or 14 hours per day; he also stated that visits by his family were more difficult, because Clinton is located farther from his family's home in New York City than is Wallkill.[9]

Superintendent Butler testified that he normally did not oppose the circulation of petitions at Wallkill, but that after he conferred with his staff he became concerned about the union petition because of the antagonistic positions of the Inmate Liaison Committee and the other inmates. He also testified that he did not institute any disciplinary proceedings against the transferred inmates and that he did not, by transferring them, cause them to lose any good time, to be placed in segregated confinement, or to be treated specially at the receiving institutions.

2. The district court granted declaratory relief but declined to issue an injunction, because respond-

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[8] Because Wallkill is a "unique" prison he could not have been transferred to a comparable institution.

[9] Wallkill is located approximately 80 miles from New York City, and Clinton is approximately 300 miles from the city.

ent by that time had been returned to Wallkill by the prison authorities (Pet. App. 36). The court stated in its opinion that in the circumstances of the case "transfer was as much a disciplinary measure as others for which an administrative hearing is provided in the prison rules" (Pet. App. 42). Because it viewed the transfer as a disciplinary measure, and because it believed that respondent had been subjected to a "significant loss" (*ibid.*), the district court concluded that notice and opportunity for hearing were required. The court stated (*id.* at 41):

> [I]t is quite evident that to be located at Wallkill is a status prized by inmates. The advantages of the facility over other correctional facilities are numerous. Whether it is deemed a right or a privilege, the interest in continuing to be situated there is sufficiently great that transfer in direct response to his activity deserves some sort of "due" process * * *.

3. The court of appeals expressly rejected an argument that any hearing requirement should be confined to transfers carried out as punishment (Pet. App. 25). Instead, it reasoned that all transfers from medium security institutions to maximum security institutions constrict the amenities available to an inmate and consequently constitute "grievous loss" requiring the procedural protection afforded by notice and hearings. The court stated (Pet. App. 26-27):

> In our view [petitioners'] position gives insufficient consideration to the very real loss that an inmate may sufer [sic] even when his transfer is not part of formal disciplinary proceedings and

> has no adverse parole consequences. It also overlooks the danger that a transfer, when based on rumor or "confidential" information about an inmate's behavior, past or planned, may be arbitrary and unjustified by the facts. These factors, the adverse consequences to the prisoner and the chance of error, are the principal elements to be considered in determining what process is due the transferred prisoner, rather than the label put on the transfer. Where the prisoner suffers substantial loss as a result of the transfer he is entitled to the basic elements of rudimentary due process, i.e., notice and an opportunity to be heard. [Citations omitted.] See also *Landman* v. *Royster*, 333 F. Supp. 621, 645 (E.D. Va. 1971) (questioning distinction between deprivations constituting "punishment" and those presented as techniques for the maintenance of "control" or "security"). While no formal disciplinary proceedings were involved in the present case the district court found that Newkirk was deprived of living conditions and job and training opportunities for which he had waited for six years and which he was apparently eager to retain. Since this was a substantial loss he was entitled to know the reasons for the transfer, to be heard, and to be permitted to demonstrate the existence of factual errors in the basis for the discharge.

Once the court determined that the transfer entailed a sufficient quantum of loss, it applied a further principle that "fundamental fairness" (Pet. App. 28) always requires that such loss be imposed only after the facts supporting the deprivation have been

"rationally determined" (*ibid.*). Because the court believed this could be done only in an adversarial hearing, it stated that such a hearing always is required regardless of the reason for the transfer (*id.* at 28, n. 6).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals has instituted an inflexible program of trial-type hearings for all transfers from one prison to another, more secure institution, regardless of the reason for the transfer, the detriment to a particular inmate, or the needs of prison administration. Moreover, subsequent to the decision in the instant case, another panel of the Second Circuit, in *United States ex rel. Haymes* v. *Montanye*, No. 74-1208, decided October 4, 1974, petition for a writ of certiorari pending, No. 74-520, extended the requirement of trial-type hearings to all transfers between institutions, whether or not conditions of confinement are altered by the transfer. The *Haymes* panel held that "the mere fact of dislocation" is grievous loss sufficient to require notice and a hearing (Pet. No. 74-520 App. 10a).

We submit that these decisions, whether or not their holdings are correct as applied to their particular facts, failed to analyze the interests involved in prison transfers from the point of view of both the desires of the inmate and the goals and necessities of prison administration. Because the court looked solely at the alleged injury to the prisoner's

interests,[10] it formulated a rule that is unnecessarily broad and rigid, with a sweep unsupported by the Fifth and Fourteenth Amendments.

The decisions as written compel prison administrators to accord hearings to all transferees whether or not any substantial interest of the inmate is affected and whether or not such a hearing would deal with facts relevant to the decision to carry out such a transfer. Because a substantial portion of all federal inmates are transferred each year, this decision, if the same approach is adopted by this Court, will have widespread effect and could significantly interfere with the functioning of the federal prison system. Moreover, there would appear to be little rational basis for distinction between the effect on prison inmates of a decision to transfer them to another facility and the impact upon them of decisions regarding initial placement, furlough, and reclassification within an institution. If the rationale of the court below is expanded to include a requirement of hearings in all of these situations, it will work a

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[10] The *Haymes* court reached this conclusion even though it acknowledged that transfers often are not accompanied by any deprivations or changes in circumstance other than the change in location, and even though some transfers are predicated on reasons, such as overcrowding, that are so unrelated to the inmate's behavior that "the decision whether to transfer may not be advanced in any way by providing notice and a hearing to the transferee" (Pet. No. 74-520 App. 6a). Surely there is something seriously wrong with a rule that requires diversion of limited prison system resources to hearings that "may not * * * advance * * * in any way" the objective of making sensible transfer decisions.

substantial change in the relationship between the inmate and the prison authorities. A change of this sort, which will convert many if not most decisions affecting an inmate into adversarial struggles between the inmate and his custodians, could have far-reaching effects on the usefulness of the prison both as a place of rehabilitation and as a place of confinement. Indeed, the provision of administrative hearings threatens, under the impact of decisions such as these, to become the principal function of prison administrators.

Because of a combination of factors—concern about the potential for violence in response to notification of transfer, the certainty of considerable administrative burden, and the unknown effects that proliferating hearing requirements would have in changing the posture of inmates vis-a-vis their custodians—the Bureau of Prisons (which has discretion under 18 U.S.C. 4081 and 4082(b) over the placement and transfer of inmates) has altered and experimented with its transfer procedures only slowly. Over an extended period of time the Bureau has revised its regulations and procedures to provide inmates with the opportunity to participate either directly or indirectly in all placement and transfer decisions. Current procedures may be summarized briefly as follows: [11] After an individual has been transported to an initial place of confinement, the Bureau under-

[11] A more complete summary is set forth at pp. 36-42, *infra*, and the Bureau's relevant policy statements are reprinted as Appendices B-E to this brief.

takes extensive studies, including multiple interviews with and tests of the inmate, in order to understand his correctional needs. On the basis of the extensive information gathered by this procedure, a classification committee decides on the appropriate place of confinement, to which he is transferred. He is then retransferred only when, in the opinion of the warden, his rehabilitation or safety, or other proper penological goals or institutional needs, require a change. Typically, when a transfer is being considered, a progress report or special progress report will be prepared, to which the inmate can contribute and which he can inspect after its preparation. Transfers also may be used as punishment, but Bureau procedures call for the inmate to receive notice and a full *Wolff*-type hearing, with the right of administrative appeal, when punishment is involved.

We do not insist that the rules and procedures now in use are the best possible procedures from the point of view of either the inmates or prison officials. But we do suggest that the concerns of prison officials are important and that it would be inappropriate for a court, in the name of procedural due process, suddenly to alter the balance that has been reached through this continuing process of revision and to substitute, in its stead, an inflexible regimen of constitutional rules. We submit that, however great may be the wisdom of the rules promulgated by the court below, they are not required by the Constitution except in cases arguably involving the punishment of an inmate for misconduct in the prison.

I

A threshhold deficiency in the analysis of the court below is its failure to ascertain the extent, if any, to which an inmate's current living conditions are a "liberty" or "property" interest within the meaning of the Fifth Amendment. Only if "liberty" or "property" is involved is it necessary to undertake the next level of inquiry: whether the loss is so great that it is "grievous." The court below, however, addressed only the subsidiary "grievous loss" question. This incorrect approach led it almost inevitably to an incorrect rule.

We agree with the court of appeals that, when prison officials deprive an inmate of a significant portion of the small stock of amenities he possesses, the difference is likely to be "felt" as "grievous loss." However, grievous loss may be imposed without the necessity of notice and hearing when what is lost is neither "liberty" nor "property." For example, a university may decline to rehire an untenured teacher, even though the "loss" of employment would have been grievous loss sufficient to trigger the requirement of notice and a hearing if there were a property interest in continued employment. Compare *Board of Regents* v. *Roth*, 408 U.S. 564, with *Perry* v. *Sindermann*, 408 U.S. 593.

We submit that an inmate does not acquire either a liberty interest or a property interest, or a "legitimate claim of entitlement" (*Roth*, *supra*, 408 U.S. at 577) to such an interest, merely by being placed by his custodian in a particular institution. His initial placement in an institution came about only because of an exercise of administrative discretion; the inmate is not entitled to compel prison officials to admit him to a specific institution, and no state of events can guarantee his continued residence there. Nor, in the ordinary case of imprisonment, has any level of government, by statute or regulation, made any promise to the inmate, either express or implied, that he will be afforded continued residence in any particular institution. Quite the contrary, the very fact of his conviction for a crime, and the legitimate placement of his person into the hands of a custodian who will be responsible for his safekeeping and the supervision of the most intimate details of his life, removes from the prisoner any legitimate expectation that he will be able to control the conditions of his confinement. Any expectation of permanence in conditions is generated by the inmate himself, not by his custodians.

Nor does the Due Process Clause itself create such a claim of entitlement. The conviction and authorized incarceration of any person entitles his custodian to expose him to at least that range of custodial conditions reasonably anticipated by the judge pronouncing the sentence, so long as those conditions do not independently violate the Eighth Amendment. While we do not suggest that it is desirable that transfer decisions be made arbitrarily or on the basis of mistaken factual assumptions, subjection of prison inmates to custodial decisions that in some instances are not fully responsive to their situation, while un-

pleasant, is not barbaric, uncivilized, or rejected by the modern community. The risk of occasional subjection to arbitrariness is to some extent inherent in the custodial relationship, and the existence of that inherent risk does not by itself create a right in the prisoner to the provision of procedural due process.

We submit, therefore, that an inmate does not ordinarily possess a legitimate claim of entitlement to remain in the particular conditions of confinement into which he temporarily may be placed. Because his removal into another institution does not deprive him of liberty or property, he is not entitled to notice and a hearing even though the change in circumstances may be perceived as "grievous loss." However, the constitutional analysis may be different when a transfer is made for punitive purposes. In such cases, it could be argued that the inmate has a legitimate expectation that the conditions of his incarceration will not be substantially degraded for reasons unrelated to the ordinary consequences of his initial commitment. The Court need not here decide the broad question whether the fact that a transfer is made for punitive purposes, standing alone, sufficiently alters the constitutional equation so that a "legitimate claim of entitlement" exists, since such a claim would arise where procedural requirements are imposed by regulation. Both federal and New York prison regulations provide that when an inmate is punished for rule infractions subsequent to his conviction, he is entitled to notice and a hearing. Thus, the regulations promulgated by prison administra-

tors here, similar to the regulations in *Wolff* v. *McDonnell*, No. 73-679, decided June 26, 1974, create a legitimate claim of entitlement not to be punished unless the facts justifying such punishment are present. In this respect, we agree with the court below that the "label" attached to the transfer by prison officials is irrelevant; instead, a functional analysis is necessary in order to isolate those transfers that are punitive or the equivalent of punishment and hence involve a legitimate claim of entitlement.

II

Even when the prisoner arguably has been deprived of a liberty or property interest, it is necessary to examine all interests at stake in order to determine how much "process" is "due." We submit that this interest analysis, too, requires administrative transfers to be treated differently from punitive transfers.

The constitutional balance for prison discipline has been struck in *Wolff* v. *McDonnell*, *supra*, and we see no difference between in-prison punishment and punishment effected by transfer that would justify different treatment for due process purposes. In either case the inmate has been deprived of a legitimate claim of entitlement, and the *Wolff* procedures should be used if he can establish that he has suffered "grievous loss." However, *Wolff* carefully confined its analysis to punitive deprivations, and we believe that countervailing factors compel a different result for deprivations that occur as a result of nonpunitive decisions.

The range of reasons for which an inmate may be transferred is quite broad: these include the initial classification decision to transfer an inmate to an institution apparently most suitable for the inmate; placement in an institution nearer the offender's release point; placement in an institution more appropriate to the length of time remaining to be served; placement in an institution containing more appropriate training or medical facilities; removal from an institution to which adjustment has been poor; transfers to reduce excessive population or increase deficient population; removal for the safety of the transferred inmate or other inmates; *etc.* Many of these causes for transfer do not turn upon objective inmate-specific facts of the sort most appropriate to trial-type determination. Some of them require only the determination of "legislative" facts about which the inmate could offer little of importance at such a hearing. Others may offer appropriate occasions for entertaining the inmate's views, but these may be obtained without a formal adversarial hearing in every case. Other transfers are made because of suspicions that are incapable of objective proof in the particular case but nevertheless justify action. In sum, there is no need for a rigid, uniform approach to all of these transfers, nor is one warranted.

Of course, even in many of the foregoing categories, inmate-specific facts may to some extent be relevant to the transfer decision, and hearings might on occasion operate to prevent a transfer prompted in part by a mistaken view as to those facts. But it

is the judgment of prison authorities that the institutional costs of providing procedures to reduce the risks of mistakes of this sort probably outweighs the benefits to be derived from such procedures. We believe that courts should proceed with considerable caution before overriding these judgments and imposing constitutional (and therefore unalterable) procedural requirements on this kind of custodial decision making.

Moreover, provision of a trial-type hearing on every transfer occasion does not necessarily increase the welfare of inmates as a group. It has been contended with some cogency that converting the relationship between the inmate and his custodian into a formally "adversarial" one may interfere with the rehabilitative goal of these institutions and make prison life more acrimonious than is otherwise necessary. Notice of the transfer may increase the possibility that inmates, disappointed by the prospect and despairing of their ability to prevent it, may act violently toward their custodians or other inmates. Finally, to the extent a hearing will operate to keep within a particular prison one who otherwise would leave, it also will keep out of the presumably "more desirable" institution one who otherwise would gain entry: one inmate's gain is another's loss. Accordingly, where the purpose of the transfer is not to impose such a loss, but simply to allocate the inmates to the institution that (for whatever reason) is judged by administrators of the prison system to be most appropriate for them, the Due Process Clause

does not require pre-transfer hearings of the kind required under *Wolff* for punishment.

III

We submit that the Due Process Clause is fully satisfied if notice and opportunity for a *Wolff* hearing is afforded whenever an inmate is transferred for purposes of punishment. We acknowledge that this basic rule may at times prove difficult to administer and create the possibility of subterfuge by label, and that difficult cases arise when a transfer is supported by past incidents of misbehavior that could have been, but were not, the subject of in-prison discipline. However, the Constitution does not require this Court to presume that officials will engage in such subterfuge. The difficult problems of line drawing can be overcome.

Whether or not a *Wolff*-type procedure is followed with every transfer, the inmate is at liberty to bring an action alleging that the transfer was undertaken for a prohibited reason, such as religion or race. No transfer may be based on such a prohibited reason. But the possibility that this prohibition may be evaded does not compel officials to hold a hearing prior to every transfer. Only if the inmate can establish a prima facie case of use of such a reason are the authorities required to justify their actions. Similarly, we submit that transfer without a hearing for the purpose of punishment may be viewed as a "prohibited reason". The inmate could attempt to establish a prima facie case that the transfer was

carried out soon after an incident that could have been the subject of discipline. If such a case can be established, prison officials can show in response that the transfer was not what it appears to be.

But it is unnecessary for prison officials to hold a hearing in every instance; the difficulties in drawing a line between those cases in which the Constitution requires a hearing and those cases in which it does not should not be overcome by extending the requirement of a hearing to every case. The courts should not impose a substantial requirement solely in order to diminish the necessity of judicial line-drawing. In any event, to the extent the line is a difficult one to draw or maintain, the prospect of repeated judicial challenge will be an incentive for prison officials to extend the availability of hearings to borderline cases. This compromise by those officials charged with the administration of the prisons, and most knowledgable about the effects of their decisions on the functioning of those institutions, is a more satisfactory solution that an unnecessarily broad and rigid rule of constitutional proportions applied indiscriminately to all transfer decisions.

ARGUMENT

I. AN INMATE IS NOT DEPRIVED OF LIBERTY OR PROPERTY WHEN TRANSFERRED FOR NONPUNITIVE REASONS

A. Due Process Requires Notice And Opportunity For Hearing Only When An Individual Is Deprived Of A Benefit Conditioned By Law On The Existence Of A Controvertible Fact

A threshhold difficulty in the analysis of the court below is its failure to consider the nature, if any, of the inmate's "liberty" or "property" interest in the maintenance of the particular conditions of confinement into which he has been placed. It is undisputed that the Due Process Clause applies only to deprivations of liberty or property. *Board of Regents* v. *Roth*, *supra*; *Cafeteria Workers* v. *McElroy*, 367 U.S. 886. Consequently, even though loss of the opportunity for future employment in those cases may have been "felt" as "grievous loss", the Due Process Clause did not require any procedural formalities.

In *Morrissey* v. *Brewer*, 408 U.S. 471, 480-482, the Court first determined that revocation of parole deprives an individual "of the conditional liberty properly dependent on observance of special parole restrictions" (*id.* at 480). After finding such a liberty interest, the Court proceeded to the question of how much process is due. In similar fashion, the Due Process Clause requires notice and opportunity for a hearing before an inmate may be transferred from one place of confinement to another only if the transfer deprives him of either "liberty" or "property" within the meaning of the Fifth Amendment. The suppressed assumption of the court of appeals was that, whenever a "grievous loss" occurs, the loss must have been occasioned by the deprivation of such an interest. That assumption is incorrect.

"Grievous loss" is felt by an individual whenever he is subjectively disappointed by the inability to retain in the future what he had possessed in the past, or to obtain what he expected to have in the future. In either form, it can be occasioned as easily by an expectation as by an impact upon a liberty or property interest. But the Fifth Amendment does not protect a "unilateral expectation"; an individual must have a "legitimate claim of entitlement" before his expectations are constitutionally shielded. *Roth*, *supra*, 408 U.S. at 577. The opinion below begged the question by proceeding as if such a legitimate claim of entitlement is involved in all prison transfers simply because "grievous loss" may be felt.[12]

Although this Court has never defined the conditions that create a legitimate claim of entitlement, recent due process cases consistently require, at a minimum, the existence of some rule that, if a certain state of facts exists, the government must take specified action. In other words, some independent legal force must remove or curtail governmental dis-

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[12] The same bootstrapping process is used in the otherwise helpful Note, *Procedural Due Process in the Involuntary Institutional Transfer of Prisoners*, 60 Va. L. Rev. 333 (1974).

cretion. See *Arnett* v. *Kennedy*, 416 U.S. 134, 181-182 (opinion of White, J.).

A reasonable definition of a legitimate claim of entitlement would be that

> [a]n entitlement is a legally enforceable interest in receiving a governmentally conferred benefit, the initial receipt or the termination of which is conditioned upon the existence of a controvertible and controverted fact.

Geneva Towers Tenants Organization v. *Federated Mortgage Investors*, 504 F.2d 483, 495-496 (C.A. 9) (Hufstedler, J., dissenting). The interest may be created by the common law (*Perry* v. *Sindermann*, *supra* (implied contract); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (contract)); by statute (*Goldberg* v. *Kelly*, 397 U.S. 254; *Arnett* v. *Kennedy*, *supra*; *Morrissey* v. *Brewer*, *supra*; *Bell* v. *Burson*, 402 U.S. 535); or by administrative regulation (*Wolff* v. *McDonnell*, *supra* (regulation providing that loss of good time or segregation be inflicted only as punitive sanctions)). But in all of these cases officials either were required by extrinsic rules, or had obligated themselves by regulation, to take certain specified actions only in response to a specific set of facts. Under such circumstances, the Court concluded that notice and opportunity for hearing were required by the Due Process Clause so that the affected individual could present to the responsible official his version of these controvertible facts. However, as we next demonstrate, these conditions do not exist in the case of prison transfers, and therefore a prisoner has no

claim of entitlement to the continuation of his current conditions of confinement.

B. An Inmate Does Not Have Either A Liberty Or A Property Interest In The Continuation Of Any Particular Conditions Of Confinment

It is difficult, in the context of imprisonment, to distinguish a "liberty" interest from a "property" interest, and we do not here attempt to differentiate the interests; it will be sufficient for the analysis here to refer to either or both as a "legitimate claim of entitlement."

We submit that any such claim of entitlement by an inmate to the benefits of his immediate surroundings is properly taken from him by the judgment convicting him of a crime and the sentence of imprisonment. What remains is not liberty—for that has been withdrawn—but the conditions surrounding the prisoner's lack of liberty. The sentence of imprisonment places him in the hands of those who will be his custodians for the purposes of punishing him for his crime, detaining him so that he cannot harm others, and, if possible, rehabilitating him so that when he is released he will not resume the conduct that led to his incarceration. See Packer, *The Limits of the Criminal Sanction* 35-70 (1968). Once he has been convicted he may lawfully be subjected to severe restraints including, if necessary, maximum security confinement and administrative isolation, so long as the confinement is not cruel and unusual punishment within the prohibition of the Eighth Amendment. All of this is, we submit, a necessary concomitant of in-

carceration. See *Wolff*, *supra*, slip op. at 15; *Pell* v. *Procunier*, No. 73-754, decided June 24, 1974, slip op. 4-6; *Price* v. *Johnston*, 334 U.S. 266, 285.

Once he has been confined, no particular set of facts entitles the inmate to a particular place or particular conditions of confinement. His custodian may send the prisoner to any institution that, in the best judgment of the custodian, will advance the purposes for which the inmate has been imprisoned and the needs of the penal system.[13] An inmate cannot claim an entitlement to be free of such control by the custodian, because it was *exactly* that claim that the judgment of conviction stripped from the inmate. The governing federal statutes, 18 U.S.C. 4081 and 4082(b) (App. A, *infra*, pp. 1a-2a) expressly grant to federal prison officials full discretion over the placement and transfer of prisoners. Thus, not only is there no positive source in statute, regulation, or common law for a legitimate claim of entitlement in this connection, but Congress has specifically declared that, for federal prisoners, transfers shall *not* be conditioned upon any particular state of facts.

Because no set of facts entitles an inmate to placement in any particular institution, he does not acquire a legitimate claim of entitlement to remain in any particular institution. His desire to do so is the paradigm case of the "unilateral expectation" (*Roth*, *supra*, 408 U.S. at 577) for which the Due Process Clause provides no procedural protection.[14] The inmate acquires no claim of entitlement to continuation of the *status quo* unless that claim has been established by statute or rule, and, unless the transfer is punitive, there is no such statute or rule. The sole source of the expectation of continuity of his current conditions of confinement is the inmate himself.

[13] Subject, of course, to statutes or regulations that control the exercise of this discretion. Statutes such as the Narcotics Addicts Rehabilitation Act, for example, could create a legitimate claim of entitlement enforceable, in most circumstances, by an inmate. However, 18 U.S.C. 4081 and 4082(b) (App. A, *infra*, pp. 1a-2a) vest federal prison officials with full discretion concerning an ordinary inmate's place of confinement.

C. Neither The Due Process Clause Nor The Eighth Amendment Confers A Substantive Entitlement To Continuation Of A Prisoner's *Status Quo*

Because neither statute nor rule establishes a legitimate claim of entitlement to continuation of any particular conditions of confinement, that claim, if it were to exist at all, would have to be found in the Constitution itself, either as some form of "fundamental fairness" or as part of the prohibition against cruel and unusual punishments. We submit that neither concept sets up such a substantive claim of entitlement. Cf. *Roth*, *supra*, 408 U.S. at 577.

The argument, whether based on the Fifth or the

[14] This does not, of course, mean that prison officials are free to transfer an inmate for an invidious or prohibited reason. The remedy for such a forbidden action, however, is a suit or protest by the inmate, rather than a program of pre-transfer hearings. See *Roth*, *supra*, 408 U.S. at 575; see also the comprehensive opinion in *Beatham* v. *Manson*, 369 F. Supp. 783, 791-792 (D. Conn.).

Eighth Amendment, would have to be that the Constitution substantively requires either (1) that a prisoner be subjected to conditions of confinement no more severe than are absolutely necessary to restrain and rehabilitate him, so that transfer of an inmate to "unnecessarily severe" incarceration is forbidden, or (2) that freedom from arbitrariness or risk of factual error in making decisions is itself a "liberty" interest protected by the Constitution. Neither of these approaches is persuasive.[15]

The first approach—that the Constitution compels minimum necessary restraints—is inconsistent with the idea that incarceration is, among other things, a form of punishment. Such confinement legitimately may be made uncomfortable both to punish the offender and to deter others from committing similar crimes. See, *e.g.*, *Pell* v. *Procunier*, *supra*; *United States* v. *Foss*, 501 F.2d 522 (C.A. 1).[16] See generally Zimring & Hawkins, *Deterrence* (1973).

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[15] A third possible approach is that some conditions of confinement are themselves cruel and unusual punishment. But such conditions could not be imposed whether or not notice and opportunity for hearing were afforded. Moreover, because the lower federal courts have unanimously held that administrative segregation is not *per se* cruel and unusual punishment, see, *e.g.*, *O'Brien* v. *Moriarty*, 489 F.2d 941 (C.A. 1), *a fortiori* the placement of an individual in a maximum security institution is not cruel and unusual. Cf. Comment, *The Role of the Eighth Amendment in Prison Reform*, 38 U. Chi. L. Rev. 647 (1971).

[16] See also *Williams* v. *New York*, 337 U.S. 241, 248; *Powell* v. *Texas*, 392 U.S. 514, 530.

The severity of the punishment is determined by a combination of factors, foremost among which are the length of the incarceration and the quality of the conditions of confinement. The sentencing tribunal is presently free to select, without restraint other than statutory maxima, the length-of-incarceration component. *Dorszynski* v. *United States*, No. 73-5284, decided June 26, 1974. It would make little sense, given the sentencing court's ability to control the length of incarceration, for this Court to hold that the "conditions of confinement" cannot contain a punishment component.

In any event, social science research has not yet progressed to the point where we can say with any confidence what is the "minimum" necessary restraint to be imposed on an individual. The inmate's reactions to his confinement, his future "dangerousness", and the optimum conditions for his rehabilitation are all so speculative that it would be practically impossible to supervise a "minimum restraints" rule. The courts would be compelling prison officials to attempt the impossible, and the result would be both meaningless and unenforceable.[17]

Nor is freedom from arbitrariness or from risk of factual error itself part of the inmate's "liberty" interest. As we discuss *infra*, pp. 36-42, the rules of the Bureau of Prisons afford hearings to inmates for all punitive transfers and incorporate input from

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[17] Cf. Note, *Guilt by Physiology: The Constitutionality of Tests to Determine Predisposition to Violent Behavior*, 48 S. Calif. L. Rev. 489 (1974).

the prisoner into other transfer decisions. They reflect a reasonable accommodation of the interests of both the prisoner and the prison system. However, the Bureau was not required by the Constitution to introduce all of these procedures. There is no abstract constitutional right to be free of all apparently "arbitrary" conduct where that conduct does not deprive an individual of liberty or property. *Cafeteria Workers, supra; Roth, supra.* True, the function served by hearings is the prevention of deprivations of liberty or property based on erroneous factual premises, but it does not follow that there is a liberty or property interest in diminishing error in decisions not involving liberty or property. Any other result would simply be a bootstrap—*i.e.*, procedures are constitutionally required to diminish the risk of factual error because otherwise such error is more likely to occur.

To a considerable extent, subjection to potentially uninformed decision-making is a necessary result of committing an individual to a custodian who will control the most minute details of his daily life. Realistically, the potential for unfairness, even under the most comprehensive procedures, can be eliminated only by eliminating the custodial control. Moreover, it has been theorized that such a regimen—subjection to potentially authoritarian control that will increase the individual's responsiveness to social rules—may be an important part of rehabilitation.[18] See, *e.g.*,

[18] But see Note, *Bargaining in Correctional Institutions: Restructuring the Relation between the Inmate and the Prison Authority*, 81 Yale L.J. 726 (1972).

Glaser, *The Effectiveness of a Prison and Parole System* 122-123 (1969); Ohlin, *Modification of the Criminal Value System*, in *The Sociology of Punishment and Correction* 179 (Johnston, Savitz & Wolfgang ed. 1962). Finally, we submit that incarceration may permissibly include an element of subjection to administrative action based on possibly incomplete information; it is part of the panoply of things that makes incarceration unpleasant, and therefore legitimately part of its deterrent value.

D. An Inmate May Possess A Legitimate Claim Of Entitlement Not To Be Punished For Acts Of Misconduct Unrelated To Those For Which He Was Convicted

We have contended above that an inmate ordinarily possesses no legitimate claim of entitlement to retain any particular conditions of confinement into which he had been temporarily placed. It could be contended that a different result is required when the justification for the alteration of conditions is an attempt by officials to punish the inmate for an act of misconduct subsequent to the offense for which he was convicted.[19] In such a case, the custodian may be considered to be taking steps to augment the severity of the convict's confinement, or to discontinue re-

[19] Of course, this discussion is limited to those punitive events that impose grievous loss on the inmate; the Due Process Clause does not require an adversarial hearing for even punitive deprivations of less important liberty or property interests. *Wolff, supra*, slip op. at 30, n. 19; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337.

habilitative programs, for reasons that do not derive from the justification for the initial confinement and its concomitant consequences. This could be seen as subjecting the individual to a deprivation of liberty more severe than originally authorized. It could be argued that the individual has a legitimate claim of entitlement to be free from such augmentation unless he is afforded procedural due process, which ordinarily would consist of some form of notice and opportunity for hearing whenever the new punishment is sufficiently severe.

However, it is unnecessary in this case to reach the issue whether the fact that a transfer is punitive, standing alone, would create a legitimate claim of entitlement. New York State and the United States Bureau of Prisons, like the Nebraska Penal and Correctional Complex in *Wolff*, *supra*, now have in force regulations providing that punishment shall be meted out to inmates only for the violation of certain rules or standards of conduct. By undertaking not to impose punishment except for misconduct, the government has created a legitimate claim of entitlement. Because the government has "recogniz[ed] that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance" and therefore is a liberty interest within the Fifth and Fourteenth Amendments. *Wolff*, *supra*, slip op. 15-16. This creation by the state and federal governments of a liberty interest in freedom from punishment is a sufficient ground for distinguishing transfers for punishment from administrative transfers, in which no liberty or property interest is involved.

II. ADMINISTRATIVE AND PENOLOGICAL CONCERNS REQUIRE A FLEXIBLE APPROACH IN DETERMINING WHAT PROCESS IS "DUE"

If the Court does not accept our argument that only punitive transfers implicate "liberty" or "property" and require some procedural due process, it is then necessary to consider both the interest of the individual and the countervailing interests of the penological system in determining how much and what process is "due." *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 481; *Wolff*, *supra*. By considering only whether, in general,[20] transfers inflict "grievous loss," the court of appeals failed to undertake this required balancing procedure and consequently erred by requiring inflexible procedures regardless of the quantum of loss to the inmate in particular cases and the goals and needs of the prison system.[21]

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[20] See *United States ex rel. Haymes* v. *Montanye*, *supra*, which concluded that all transfers portend "grievous loss."

[21] Other federal courts that have considered the requirements of prison transfers have made similar errors. Perhaps the leading authority is *Gomes* v. *Travisono*, 490 F.2d 1209 (C.A. 1), vacated and remanded, No. 73-1335, decided July 8, 1974, modified and affirmed on remand, No. 73-1065 (C.A. 1, decided December 20, 1974). *Gomes* initially required some procedural safeguards in all transfers but differentiated between punitive transfers (which received procedures substantially similar to those later approved in *Wolff*) and administrative transfers, which it held required only advance notice and an informal opportunity to respond. On remand,

We submit that, although the constitutional accommodation properly applicable to punitive transfers already has been struck by *Wolff* v. *McDonnell*,

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however, the court held that under *Wolff* the purpose and motive for the transfer should be irrelevant because all transfers imposed burdens on inmates and administrators unrelated to the transfer's purpose. We submit that *Gories* both misapprehended *Wolff* and is factually incorrect with respect to the burdens imposed on inmates and administrators.

Other courts have imposed *Wolff*-type procedures only in cases of disciplinary transfer. See, *e.g.*, *Ault* v. *Holmes*, No. 73-2049 (C.A. 6, decided November 15, 1974), affirming in part and vacating in part 369 F. Supp. 288 (W.D. Ky.); *Stone* v. *Egeler*, No. 74-1256 (C.A. 6, decided November 15, 1974), modifying and affirming 377 F. Supp. 115 (W.D. Mich.); *Fajeriak* v. *McGinnis*, 493 F.2d 468 (C.A. 9) (by implication; holds that routine administrative transfers may be made without hearing); *Bryant* v. *Hardy*, 488 F.2d 72 (C.A. 4) (by implication, holds that need for hearing depends on reasons for and consequences of transfer).

Several district courts have required adversarial hearings for all transfers, regardless of the reason they are carried out. *Aikens* v. *Lash*, 371 F. Supp. 482 (N.D. Ind.); *King* v. *Higgins*, 370 F. Supp. 1023 (D. Mass.) (by implication); *Hoitt* v. *Vitek*, 361 F. Supp. 1238 (D.N.H.); *Kessler* v. *Cupp*, 372 F. Supp. 76 (D. Ore.); *Capitan* v. *Cupp*, 356 F. Supp. 302 (D. Ore.); *Robbins* v. *Kleindienst*, 383 F. Supp. 239 (D.C. D.C.), dismissed by stipulation November 27, 1974); *Adamson* v. *Ranger*, No. 73-2594 (C.D. Cal., decided October 3, 1974). The rationale for all of these cases is that the quantum of "grievous loss" suffered by the inmate does not depend upon the reason for the transfer.

On the the other hand, several district courts have held that an adversarial hearing is required only when a transfer is effected for disciplinary reasons. *Walker* v. *Hughes*, 375 F. Supp. 708 (E.D. Mich.) (court will look to "true" reason for transfer); *Beatham* v. *Manson*, 369 F. Supp. 783 (D. Conn.); *Croom* v. *Manson*, 367 F. Supp. 586 (D. Conn.). Cf. *Schumate* v. *New York*, 373 F. Supp. 1166 (S.D.N.Y.) (hear-

supra, a different balance is appropriate in cases of non-punitive transfer.[22]

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ings required only when there is a substantial change in quality of confinement).

Finally, a number of courts have held that hearings are never a prerequisite to the transfer of an inmate. *United States ex rel. Arzonica* v. *Scheipe*, 474 F.2d 720, 721 (C.A. 3); *Gray* v. *Creamer*, 465 F.2d 179, 187 (C.A. 3) ("a state prisoner has no constitutional right to remain in any particular prison" and, therefore, no right to procedural protection); *Urbano* v. *McCorkle*, 334 F. Supp. 161 (D.N.J.), affirmed, 481 F.2d 1400 (C.A. 3); *Hillen* v. *Director*, 455 F.2d 510 (C.A. 9); *Benfield* v. *Bounds*, 363 F. Supp. 160 (E.D.N.C.); *Bundy* v. *Cannon*, 328 F. Supp. 165, 173 (D. Md.). Similarly, courts have held that the initial transfer as part of the classification process is within the discretion of the Attorney General and that no hearings are required. *Rodriguez-Sandoval* v. *United States*, 409 F.2d 529 (C.A. 1); *Van Sirrs* v. *Ciccone*, 437 F.2d 884 (C.A. 8) (initial placement decision not reviewable for abuse of discretion); *Lawrence* v. *Willingham*, 373 F.2d 731 (C.A. 10); *Rees* v. *Peyton*, 341 F.2d 859 (C.A. 4); *Hogue* v. *United States*, 287 F.2d 99 (C.A. 5), certiorari denied, 368 U.S. 932; *Rayborn* v. *Swope*, 215 F.2d 604 (C.A. 9); *Dominguez* v. *Mosley*, 317 F. Supp. 10 (D. Kan.), affirmed, 431 F.2d 1376 (C.A. 10); *Muniz* v. *United States*, 280 F. Supp. 542 (S.D.N.Y.).

[22] Again, this observation is qualified by the requirement that "grievous loss" be present as a necessary pre-condition to any requirement of hearing, even when a transfer is punitive. In our view, it would be the rare case in which grievous loss would be imposed by a transfer from one institution to another of the same security level, and even many transfers to more secure institutions may be free of grievous loss if they do not affect good time, impair opportunities for parole, or involve administrative segregation. But see *Clutchette* v. *Procunier*, No. 71-2357 (C.A. 9, decided October 21, 1974), reconsidering 497 F.2d 809 (hearings required for loss of privileges, however minor); *United States ex rel. Haymes* v. *Montanye*, *supra* (almost all prison deprivations are grievous loss).

A. The Current Practices Of The Bureau Of Prisons Provide Flexible But Adequate Accommodation Of The Interests Of The Inmates And The Institutions

Prisons are closed societies of proven lawbreakers under the constant supervision and control of a limited staff. Widespread hostility, frustration, and inevitable disenchantment on the part of the inmates with their predicament make the atmosphere frequently tense and hostile. Cf. *Wolff*, *supra*. Prison authorities believe that testimonial confrontations between an inmate and staff members or other inmates can exacerbate these tensions and therefore are normally to be avoided, even at the cost of an increased possibility of error in decision-making, with the disappointment and frustration such error can generate. To a great extent, the development of procedures governing transfer, classification and discipline of inmates has been a process of accommodating the desire for the increased accuracy hearings can produce with the need for substantial flexibility in meeting volatile conditions and the need for minimizing both the administrative inconvenience and the potential for strife inherent in any hearing procedure.

The Bureau of Prisons has been engaged in a continuing process of re-evaluation of its procedures, which reflects a concern with assuring fairness and minimizing the likelihood of arbitrary action. This ongoing process should be allowed to continue without being fettered by an unyielding constitutional mandate requiring recognition in all prisons, for all

cases, of procedural rights not yet widely proven to be either necessary or advantageous to either inmate or administrator. We believe that the current rules and procedures are a reasoned and reasonable accommodation of conflicting interests, developed by authorities who bear the heavy burden of maintaining order and providing for rehabilitation in a closed society of a typically disorderly people.

1. *Statutory Transfer Authority*

Prior to 1930 a federal prisoner automatically was incarcerated in a state prison in the district in which he or she was convicted. See 1873-1879 Rev. Stat. 5540, 5541, 5542, 5546; S. Rep. No. 533, 71st Cong., 2d Sess. When the Bureau of Prisons was created in 1930, the Act of May 27, 1930 (App. A, *infra*) required the Bureau to create and maintain a diversified system of institutions to meet the variety of needs encountered in a diverse group of inmates. Sentencing judges were given authority to determine the "type" of institution in which a convict should be incarcerated. After the judge had selected the type of institution, the Attorney General was authorized to choose a specific prison and thereafter to transfer the prisoner in his discretion in order to alleviate overcrowding or attain other penological objectives. Section 7 of the Act of May 14, 1930, 46 Stat. 326. This plan proved too inflexible to meet the administrative and rehabilitative needs of the federal prison system. Often courts designated a type of institution not equipped to furnish appropriate custody, disci-

pline, care and treatment. In order to ameliorate this problem, an individual was initially assigned to an institution of the type designated by the court and then immediately removed to a more appropriate place of custody.

In 1941 Attorney General [later Justice] Jackson proposed to Congress that the Attorney General be given full discretion to designate and change the place of custody. His letter explained that such administrative discretion was important in order to ensure that inmates would be placed in institutions most conducive to their safekeeping and rehabilitation. See S. Rep. No. 369, 77th Cong., 1st Sess., 1-2. The authority Attorney General Jackson sought eventually was granted (App. A, *infra*). Subsequent changes have allowed the Attorney General to "extend the limits of the place of confinement" by granting furlough or work release (18 U.S.C. 4082(a), App. A, *infra*). Special forms of treatment and confinement, some of which are discretionary with the Attorney General and some with the courts, have been established for juveniles (18 U.S.C. 5032), youthful offenders (18 U.S.C. 5010-5015, App. A, *infra*), narcotic addicts (18 U.S.C. 4253, App. A, *infra*), and mental defectives (18 U.S.C. 4241, App. A, *infra*). Each of these procedures operates differently and with different effects on the inmate and different problems for administrators.

2. *The Bureau's Designation and Classification Procedures*

Offenders initially are placed in the custody of the United States Marshal Service, which has access to

copies of their judgment and commitment orders and any available presentence reports. Policy Statement 7300.65, dated March 22, 1972 (App. D, *infra*). The Service designates an initial place of confinement that appears to satisfy the prisoner's needs for custody and that has an inmate population similar to the prisoner.

As soon as the prisoner arrives at the place of initial custody, a classification study is undertaken in accordance with Policy Statement 7200.11A, dated March 6, 1972 (App. B, *infra*). The prison staff assembles background data, performs educational and psychological tests, and observes the inmate's adjustment to the institution. Several interviews are held with the inmate, both to familiarize the prisoner with the institution and its expectations of him and to enable the staff to establish a good personal relationship with the new inmate.

All of the information gathered by the staff is used by the classification committee (consisting of a caseworker, correctional counsellor, education specialist and health specialist) in the preparation of a classification study that formulates an individual correctional program meeting, so far as possible, the needs of the offender. If it is determined on the basis of this subjective evaluation that either the custodial or the rehabilitative needs of an offender could be met more adequately by another institution, the classification committee recommends the immediate transfer of the inmate to another facility.

3. *The Bureau's Transfer Policy*

The Bureau's transfer policy is delineated in Policy Statements 7300.13D, dated June 19, 1974 (App. C, *infra*), and 7400.5C, dated October 4, 1974 (App. E, *infra*). Policy Statement 7300.13D authorizes the Chief Executive Officer of each prison to make transfers whenever

> it is apparent that the correctional treatment needs of the offender will be best served, or the continuity of his training and treatment program maintained, or because the resources of the institution are not adequate to meet the problems presented by him * * *. [App. C, *infra*, p. 35a.]

Whenever it is deemed advisable to make a post-classification transfer, a progress report or special progress report is prepared bringing the inmate's file up to date (App. C, *infra*, p. 49a). Such transfers may be made for a number of reasons:

> It may be "punitive", in the sense that the prison administration is simply attempting to punish a misdeed. It may be for "security" if * * * it is predicated on the apprehension of general and uncontrollable disturbance or on predictions of future misconduct by an inmate. It may be for the best interests of other inmates if the prisoner is disruptive, a threat to others, or otherwise a bad influence as would be the case of a professional with continuing outside criminal contacts. A transfer may be for the best interests of the prisoner himself, for his safety or for his rehabilitation if it is believed that he will be better off elsewhere. And a transfer may be dictated by the needs or shortcomings of the institution, e.g., to alleviate overcrowding. [*Gomes* v. *Travisono*, *supra*, 490 F.2d at 1214.]

We add that transfers also may be justified by the inmate's need for medical care, or to move him to an institution closer to his point of release or more appropriate in light of the time remaining to be served. And in almost all of these cases the transfer may be predicated not only on proof of the supporting facts, but on a reasonable, subjective belief (or even suspicion) that such supporting facts are present.[23] Many of the causes for transfer simply are not susceptible of objective delineation and others—such as the safety of the inmate or the institution—although theoretically objectifiable, are so important that officials may be compelled to act before suspicions can ripen into proof. Accordingly, we agree with the First Circuit's first opinion in *Gomes*, *supra*, that

> [t]he variety in kinds of transfer decisions and the need for latitude in administrative discretion dissuade us from attempting to impose any extensive blanket of due process procedures to cover all transfers. [*Ibid.*]

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[23] *Apropos* our argument in Part I, *supra*, it should be noted that the Bureau's regulations do not condition the power to transfer an inmate (except in cases of punishment) on the existence of any particular controvertible fact or set of facts although, of course, various facts may often be relevant to the discretionary transfer decision. This discretion is circumscribed only with respect to transfers of offenders sentenced under particular statutes and transfers to certain special purpose institutions. App. C, *infra*, pp. 36a-49a.

Recognizing the diversity in situations transfers must meet, and in light of the potential disadvantages of widespread adversarial hearings, Policy Statement 7300.13D (App. C, *infra*) does not provide for any inmate involvement in the transfer, except to the extent the inmate may be involved in the formulation of the progress report or special progress report.

On the other hand, transfers effected for the purpose of punishment are covered by Policy Statement 7400.5C (App. E, *infra*), which provides that transfers are one of the "sanctions or dispositions" available to the Inmate Disciplinary Committee. App. E, *infra*, p. 81a. In such cases the committee follows all of the procedures required by *Wolff*, *supra*,[24] and in addition administrative appeals are routinely available.[25] App. E, *infra*, pp. 76a-80a, 84a-85a. We submit that this fully comports with the requirements of the Due Process Clause.[26]

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[24] In emergecy situations, transfer may precede hearing, but this is not inconsistent with *Wolff*.

[25] The only difference between punitive transfers and other forms of discipline is that, when the hearing is held in the transferee institution because the emergency transfer preceded the hearing, written statements are liberally accepted in lieu of live testimony. Policy Statement 7400.5C, section 9(d)(6) (App. E, *infra*, pp. 82a-83a).

[26] The government often is permitted to take actions pursuant to an authorized non-hearing process. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663; *Bob Jones University* v. *Simon*, 416 U.S. 725; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594. See generally Freedman, *Summary Action by Administrative Agencies*, 40 U. Chi. L. Rev. 1 (1972).

B. The Court Should Proceed Cautiously Before Requiring More Extensive Use Of Hearings, Which May Be Inconsistent With Custodial Needs And Rehabilitative Goals

The variety of the reasons that may call for transfer is a weighty consideration against a uniform regimen of constitutional rules for procedures necessary prior to a transfer from one institution to another, whether or not that transfer involves movement to a more secure prison. Moreover, it also is evident that a requirement of additional hearings would entail a subsequent investment of resources that otherwise would be available for other institutional or rehabilitative purposes. There are, in addition, at least two other persuasive reasons for believing that the use of hearings (particularly adversarial hearings) should be minimized in the context of non-punitive transfers: hearings may hamper the ability of institutions to rehabilitate the inmates and they may also increase the risk of violence by disappointed inmates.

Testimonial confrontations usually can be handled well in a free society. There, the antagonisms between the individual and the opposing witnesses, who hamper the attainment of the individual's desires, may be diffused in numerous ways—sometimes by the action of the hearing official or other authorities, but more often by the fact that the individual affected may return to his home and a variety of releasing activities, avoiding further contact and venting his emotions in less explosive surroundings.

Diffusion of antagonisms occurs less readily in the typical prison setting, where the parties always re-

main in close proximity to each other and where many inmates are characteristically impulsive and action-oriented. See Halleck, *Psychiatry and the Dilemmas of Crime* 284 (1st ed. 1967); Eysenck, *Crime and Personality* 144 (1964). Give and take among the inmate and the staff is a part of the daily prison routine; when differences are handled informally (or, if necessary, by fiat), potentially disruptive confrontations may be avoided. Excessive formal confrontation may damage or destroy the supervisory counselling relationship essential to the achievement of many correctional goals. Moreover, confrontation might place the inmate in a position of equal contest with the correctional officer and thereby lead to an erosion of the officer's control and authority. See McCorkle, *Guard-Inmate Relationships in Prison*, in *The Sociology of Punishment and Correction* 108-110 (Johnston, Savitz & Wolfgang ed. 1962). One important consideration, therefore, is that in the context of the prison environment direct confrontations between inmates and staff are to be avoided whenever possible. Otherwise, "prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point * * *." *Braxton* v. *Carlson*, 483 F.2d 933, 941 (C.A. 3).

In addition, there is legitimate reason to be apprehensive that, when emotional levels are raised by continuing confrontations between inmate and staff, and between the inmate and other inmates, some inmates will resort to violence. Prisons are populated with individuals who are there because they have

demonstrated their unwillingness or inability to conform their conduct to the requirements of a free society. The range of offenses for which they are incarcerated is broad, including many crimes of violence. By definition, prison inmates share the characteristic of having on one or more occasions resorted to seriously illegal means to achieve their goals or to resolve problems confronting them. See *Wolff*, *supra*.

Inmates may be provoked into unacceptable action merely by an increase in the level of tension within the institution, which could be caused by an increased frequency of adversarial confrontations. They also may respond violently to an advance notice of a particular action that, for any of a number of reasons, is unsettling. Many inmates enter prison with feelings of hostility and frustration, perceiving themselves to have been innocent or unfairly convicted, whether or not an objective observer would agree. Such a refusal to accept guilt for wrongdoing often is accompanied by a concomitant refusal to accept the legitimacy of the authority of their custodians and a tendency to project onto the custodians blame for all events occuring in prison. See *Halleck*, *supra*, at 306; Abrahamsen, *The Psychology of Crime* 110 (1st ed. 1960). As a result of both of these influences, there is an ever-present potential in prison life for a resort to violence as a means of resolving problems, a potential that could be increased to an unknown degree by the injection of advance notice and formal hearings into major portions of prison administration. The Second Circuit analyzed the problem well in *Sostre* v. *Mc-*

Ginnis, 442 F.2d 178, 197 (*en banc*), certiorari denied *sub nom. Sostre* v. *Oswald*, 404 U.S. 1049:

> It is sad but true that the study of the prison subculture by psychologists and sociologists has until recently been largely neglected. Those who have looked into the problem, however, do not gainsay the volatility of relationships among prisoners and prison officials. * * * We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against * * * prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.

Cf. *Pell* v. *Procunier*, *supra*, slip op. at 8.

C. Many Transfer Decisions Present Issues Unsuitable For Resolution By Hearing

A large variety of transfers—perhaps most poignantly those carried out for the safety of the inmate or for the security of the institution—are undertaken without any concrete "proof" that could be adduced in a trial-type hearing, and without any "charges" that could be the subject of notice. The object of transfers of this sort is to take action before the anticipated (or feared) event comes to pass; almost by definition, it will be action founded upon suspicion rather than proof, and it would be a negligent prison administrator indeed who waited for confirmation of

his fears before taking action. Transfer decisions of this sort are not amenable to *Wolff* procedures.[27]

For quite different reasons, *Wolff* hearings are unsuitable for decisions involving transfers to different rehabilitative programs at different institutions. The important factual questions in making such transfer decisions either relate to the program at the transferee institution (a subject unlikely to be enlightened by contributions from the inmate) or to the inmate's personal prognosis. Although the inmate surely has an important contribution to make to the latter, it is most appropriately made in diagnostic interviews, in personal performance under observation in prison recreation and employment, and in communications that are incorporated in the Progress Report, which is an integral part of the transfer decision.[28] The inmate's contributions cannot usefully be made in an adversary hearing in response to notice of "charges." Cf. *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 186 (opinion of White, J.) (hearings probably not required for dismissal for "inefficiency" rather than on specific charges).

Still other transfer decisions involve few inmate-specific facts. When a prisoner is transferred because of overcrowding, for example, the most relevant facts concern the comparative population density in the

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[27] Of course, because such a transfer is supported only by suspicion, it would be improper to penalize the inmate in the receiving institution.

[28] Under Policy Statement 7200.13A, dated October 16, 1974, the inmate is shown a copy of this report.

two involved institutions; because the inmate cannot meaningfully contribute to the resolution of any factual dispute about those conditions, trial-type hearings are not constitutionally required. Where a hearing cannot serve the purpose for which it is designed, it is not inflexibly required by the Constitution.[29]

III. HEARINGS ARE REQUIRED ONLY WHEN A TRANSFER IS MADE AS PUNISHMENT OR A SUBSTITUTE FOR PUNISHMENT

We have argued that an inmate does not lose any legitimate claim of entitlement, or any liberty or property interest, unless he is transferred for punitive purposes. We also submit that, even if the first argument is incorrect, the great variety among reasons for transfer, the potentially deleterious effects of adversarial hearings upon prison administration, and the unsuitability of some transfer issues for trial-type resolution, militate against a uniform rule of procedures for all transfers. We conclude, in light of this analysis, that notice and opportunity for a *Wolff*-type hearing are required only when a transfer is used as punishment, or takes the place of punishment, and when the transfer in addition imposes grievous loss. Accordingly, transfers for penological and administrative reasons require no hearings.

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[29] Cf. *Gomes*, *supra*, on reconsideration (slip op. at 7), which, although it recognized that hearings have no constructive role to play in such decisions, nevertheless held that they were constitutionally required, and then suggested that effective "waiver" procedures be worked out. Cf. n. 10, *supra*.

There are possible drawbacks to a rule turning on the motive, purpose, or intent of prison officials. Such rules can occasionally prove difficult to administer and may contain a potential for evasion by use of labels serving no legitimate function. However, at least where prison regulations require a factual finding of misconduct prior to imposition of punishment, we believe that the distinction we have suggested is required by the Constitution, and that it cannot be avoided in the interest of establishing a bright-line test more simple to administer but substantially more burdensome to prison officials.

We acknowledge that there is a possibility of subterfuge and that the test we have suggested does not produce a clear result when a transfer is made because officials fear that an inmate will repeat in the future rule violations he has committed in the past, and for which he might have been, but was not, otherwise punished. We do not undertake a definitive resolution of the problems attendant upon identifying when there has been punishment; perhaps the developing case law will clarify what now appears difficult. But we do submit that the possibility of difficult problems in some individual cases is not an argument against the rule we have suggested; in the absence of clear evidence to the contrary, courts should presume that officials will faithfully discharge their duties as enunciated by this Court. *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15; *Willis* v. *Ciccone*, No. 74-1294 (C.A. 8, decided November 15, 1974).

In any event, motive, purpose and intent are staple

ingredients addressed by the courts in almost every criminal case and in many other cases, such as tax and tort, as well. The difficulty in their application has not prevented their use where they provide the proper dividing line between the prohibited and the permitted. And, of course, motivation may be inferred from objective criteria, see Holmes, *Privilege, Malice and Intent*, 8 Harv. L. Rev. 1 (1894). It may be, therefore, that a presumption of punishment should arise when an inmate is transferred to substantially more restrictive conditions of confinement soon after an act that could have been the subject of punishment within the institution. Again, however, it is unnecessary to resolve in this case the problem of presumptions and burdens of persuasion.

A procedure similar to that we suggest here is now used for claims that a prisoner has been dealt with for an unconstitutional reason; although prison officials have discretion to transfer an inmate for any reason or for no reason, they may not increase his discomfort for a forbidden reason such as his religion or his race. But notice and opportunity for hearing in every case are not a required prophylactic to prevent such improper transfers. *Roth*, *supra*, 408 U.S. at 575, n. 14. Instead, the aggrieved person must establish a prima facie case that he has been penalized for a forbidden reason. Similarly, the inmate should have to demonstrate that he has been transferred in a forbidden manner—for punishment but without a hearing. The effect of the distinction we have suggested is to cause transfer "for punishment

but without *Wolff* procedures" to be treated in the same manner as transfer "for a forbidden reason." In either case the inmate must establish the forbidden act; it is unnecessary to hold hearings in advance merely to minimize the possibility of evasion.[30]

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions to proceed in accordance with the opinion of this Court.

Respectfully submitted.

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JANUARY 1975.

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[30] Of course, administrators would be free to expand hearing procedures to borderline cases, in order to minimize their exposure to vexatious claims and improve the accuracy of their factfinding. But this decision is properly left to the responsible officials.

APPENDIX A

Federal Statutes

1. Section 7 of the Act of May 27, 1930, 46 Stat. 390, as amended, 18 U.S.C. 4081, provides:

The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.

2. Section 7 of the Act of May 14, 1930, 46 Stat. 326, as amended, 18 U.S.C. 4082, provides:

(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

(b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the

person was convicted, and may at any time transfer a person from one place of confinement to another.

(c) The Attorney General may extend the limits of the place of confinement of a prisoner as to whom there is reasonable cause to believe he will honor his trust, by authorizing him, under prescribed conditions to—

(1) visit a specifically designated place or places for a period not to exceed thirty days and return to the same or another institution or facility. An extension of limits may be granted to permit a visit to a dying relative, attendance at the funeral of a relative, the obtaining of medical services not otherwise available, the contacting of prospective employers, the establishment or reestablishment of family and community ties or for any other significant reason consistent with the public interest; or

(2) work at paid employment or participate in a training program in the community on a voluntary basis while continuing as a prisoner of the institution or facility to which he is committed, provided that—

(i) representatives of local union central bodies or similar labor union organizations are consulted;

(ii) such paid employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services; and

(iii) the rates of pay and other conditions of employment will not be less than those paid or provided for work of similar nature in the locality in which the work is to be performed.

A prisoner authorized to work at paid employment in the community under this subsection may be required to pay, and the Attorney General is authorized to collect, such costs incident to the prisoner's confinement as the Attorney General deems appropriate and reasonable. Collections shall be deposited in the Treasury of the United States as miscellaneous receipts.

(d) The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General, shall be deemed an escape from the custody of the Attorney General punishable as provided in chapter 35 of this title.

(e) The authority conferred upon the Attorney General by this section shall extend to all persons committed to the National Training School for Boys.

(f) As used in this section—

the term "facility" shall include a residential community treatment center; and

the term "relative" shall mean a spouse, child (including stepchild, adopted child or child as to whom

the prisoner, though not a natural parent, has acted in the place of a parent), parent (including a person who, though not a natural parent, has acted in the place of a parent), brother, or sister.

3. Sections 1, 2, and 3 of the Act of April 30, 1940, 54 Stat. 175, 176, as amended, 18 U.S.C. 4085, provide:

(a) Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such person, prior to his release, to be transferred to a penal or correctional institution within such State or District.

If more than one such request is presented in respect to any prisoner, the Attorney General shall determine which request should receive preference.

The expense of personnel and transportation incurred shall be chargeable to the appropriation for the "Support of United States prisoners."

(b) This section shall not limit the authority of the Attorney General to transfer prisoners pursuant to other provisions of law.

4. Sections 1, 3, 4, and 5 of the Act of February 26, 1929, 45 Stat. 1318, as amended, 18 U.S.C. 4125, provides:

(a) The Attorney General may make available to the heads of the several departments the services of United States prisoners under terms, conditions, and rates mutually agreed upon, for constructing or repairing roads, clearing, maintaining and reforesting public lands, building levees, and constructing or repairing any other public ways or works financed wholly or in major part by funds appropriated by Congress.

(b) The Attorney General may establish, equip, and maintain camps upon sites selected by him elsewhere than upon Indian reservations, and designate such camps as places for confinement of persons convicted of an offense against the laws of the United States.

(c) The expenses of transferring and maintaining prisoners at such camps and of operating such camps shall be paid from the appropriation "Support of United States prisoners", which may, in the discretion of the Attorney General, be reimbursed for such expenses.

(d) As part of the expense of operating such camps the Attorney General is authorized to provide for the payment to the inmates or their dependents such pecuniary earnings as he may deem proper, under such rules and regulations as he may prescribe.

(e) All other laws of the United States relating to the imprisonment, transfer, control, discipline, escape, release of, or in any way affecting prisoners, shall apply to prisoners transferred to such camps.

5. Section 6 of the Act of May 13, 1930, 46 Stat. 271, as amended, 18 U.S.C. 4241, provides:

A board of examiners for each Federal penal and correctional institution shall consist of (1) a medical officer appointed by the warden or superintendent of the institution; (2) a medical officer appointed by the Attorney General; and (3) a competent expert in mental diseases appointed by the Surgeon General of the United States Public Health Service.

Such board shall examine any inmate of the institution alleged to be insane or of unsound mind or otherwise defective and report their findings and the facts on which they are based to the Attorney General.

The Attorney General, upon receiving such report, may direct the warden or superintendent or other official having custody of the prisoner to cause such prisoner to be removed to the United States hospital for defective delinquents or to any other institution authorized by law to receive insane persons charged with or convicted of offenses against the United States, there to be kept until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence, without deduction for good time or commutation of sentence, shall have been served.

6. Section 605 of the Narcotic Addict Rehabilitation Act of 1966, 80 Stat. 1450, 18 U.S.C. 4253, provides:

(a) Following the examination provided for in section 4252, if the court determines that an eligible

offender is an addict and is likely to be rehabilitated through treatment, it shall commit him to the custody of the Attorney General for treatment under this chapter, except that no offender shall be commited under this chapter if the Attorney General certifies that adequate facilities or personnel for treatment are unavailable. Such commitment shall be for an indeterminate period of time not to exceed ten years, but in no event shall it exceed the maximum sentence that could otherwise have been imposed.

(b) If, following the examination provided for in section 4252, the court determines that an eligible offender is not an addict, or is an addict not likely to be rehabilitated through treatment, it shall impose such other sentence as may be authorized or required by law.

7. The Youth Corrections Act, 64 Stat. 1087, 18 U.S.C. 5010, 5011, 5014, and 5015, provides:

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and super-

vision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017 (d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

§ 5011. Treatment

Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment. The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment.

§ 5014. Classification studies and reports

The Director shall provide classification centers and agencies. Every committed youth offender shall first be sent to a classification center or agency. The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. In the absence of exceptional circumstances, such study shall be completed within a period

of thirty days. The agency shall promptly forward to the Director and to the Division a report of its findings with respect to the youth offender and its recommendations as to his treatment. At least one member of the Division shall, as soon as practicable after commitment, interview the youth offender, review all reports concerning him, and make such recommendations to the director and to the Division as may be indicated.

§ 5015. Powers of Director as to placement of youth offenders

(a) On receipt of the report and recommendations from the classification agency the Director may—

(1) recommend to the Division that the committed youth offender be released conditionally under supervision; or

(2) allocate and direct the transfer of the committed youth offender to an agency or institution for treatment; or

(3) order the committed youth offender confined and afforded treatment under such conditions as he believes best designed for the protection of the public.

(b) The Director may transfer at any time a committed youth offender from one agency or institution to any other agency or institution.

APPENDIX B

The Bureau of Prisons Policy Statement No. 7200.11A, on Classification Study and Initial Classification, dated March 6, 1972, provides in relevant part:

1. *POLICY.* It is the policy of the Bureau of Prisons to identify and utilize all available training and treatment resources in the correction of public offenders. This allocation of resources is implemented through a systematic classification of offenders and subsequent development of an individual program plan. Since the Classification Study provides the basis for developing an effective treatment program, it is essential for the report to be of professional quality and represent the integrity and best efforts of the classification team or committee.

* * * *

4. *CLASSIFICATION STUDY.* The Classification Study is a composite of reports and forms submitted by various departments within the institutions and represents the staff's effort to identify the offender's needs and develop a correctional treatment program to meet those needs. To facilitate the review of pertinent information contained in these reports, the study will be arranged according to the following sequence;

A. Sentence Data Summary, BP 5-1

B. Background Data, Record Form 16

C. Staff Evaluation

D. Classification Summary

E. Optional Pages, Psychiatric, Psychological and/or Religious Reports

F. Program Analysis Sheet, BP Form 6.1

G. Program Plan, Classification Form 18

H. Educational Data, BP Form 7

I. Social Data, BP Form 6

J. Medical and Related Data, BP Form 8

5. *INSTRUCTIONS FOR PREPARING THE CLASSIFICATION STUDY.* In order to assure that all Classification Studies meet Bureau requirements, the following instructions should be made available to all personnel involved in the classification process. The instructions should be referred to frequently both as a guide in completing daily work requirements and as a vehicle for training.

A. *Resource Material.* Generally, resource material such as the F.B.I. Fingerprint Report, U.S. Attorney Report, Prosecuting Agency Report, and the Presentence Investigation is made available and serves as the basis for the Classification Study. It is not necessary to reiterate all the information contained in the background material but all relevant and significant information should be summarized so that the Classification Study will be an

independent report capable of standing on its own.

The Presentence Report will continue to be the major contributing resource in the preparation of the Classification Study and to the extent that it is possible, arrangements will be made to have a copy of this report mailed to the institution so that it will be available upon the offender's arrival.

The caseworker will especially need to thoroughly review the Presentence Report in an effort to coordinate his interviews so that he will be able to obtain information that will fill-in, compliment, and amplify areas in the Presentence Report that require elaboration. Interviews should not be used to gather irrelevant data, but should be considered as a probing and diagnostic tool to provide information for evaluating causative factors in the offender's involvement in crime.

When a Presentence Report is not available, all personnel involved in preparing segments of the Classification Summary will have to make a greater effort to obtain the necessary information for effective program planning. Caseworkers should pay particular attention to reports received from other departments and conduct their interviews in a way that will aid them in filling in missing information and expand on other areas when neces-

sary. Under these circumstances, the Classification Summary will be presented in much more detail then would be required if a Presentence Investigation Report were available.

* * * *

D. *Classification Summary.* The Classification Summary is the report that brings together information which is known about the offender's criminality, past history, and current status. In the past, this report was very brief and was designed to supplement the Presentence Report and be used in conjunction with it. The previous Classification Summary format and instructions have not produced the kind of information necessary to make enlightened case management decisions without a lengthy research of the files. It has also been noted that Classification Summaries are deficient in many instances and often inconsistent with other segments of the Classification Study. In an effort to correct this problem the Classification Summary has been revised and extended and a Staff Evaluation has been added to the Study. A sample of the format to be used for Classification Summaries is attached. All institutions should plan to reproduce this format on classification form 1b until such time that revised form 17 is made available. Once the revised classification form 17 is available, it will be used as

the face sheet of the Classification Summary and form 1b will continue to be used for subsequent pages, including the Staff Evaluation.

(1) *Current Offense.* The section on current offense should provide the necessary information to determine whether or not the offense was a joint undertaking or an independent venture, a single act or part of a series of acts, situational or a culmination of extended planning. The victim's loss and the offender's net gain should also be summarized in this section. Information under current offense should be divided into two parts.

a. *Official Version and Sentence.* It is necessary for this part of the report to be lengthy. Information related to the offense, basic sentencing data, role of the offender, codefendants, loss to the victim and aggravating circumstances can be generally presented in a few sentences.

b. *Offender's Explanation.* The offender's explanation regarding the offense is essential and should include comments regarding degree of involvement, motivation, and net gain. Again, the explanation need not be long and should represent the caseworker's interpretive summary of what the offender said.

(2) *Prior Record.* It is not necessary to list the prior record in chronological order, or to describe every incident. It is important, however, to distinguish between assaultive acts and crimes against property, between misdemeanors and felonies and between juvenile and adult offenses. The material will be summarized in two parts.

a. *Summary.* In the summary, the caseworker should stress the number and types of arrest, convictions and sentences, and response to previous supervision while confined or under parole or probation supervision. An attempt should also be made to explain any substantial period for which there were no new offenses reported.

b. *Detainers.* A brief statement regarding the status of all known charges and detainers should be made.

(3) *Past History.* Although the Presentence Investigation and other resource material provides a vast amount of information regarding the offender's background, the Classification Summary should concentrate on summarizing relevant information related to the offender's social, educational, military, and employment history. The facts should be presented as succinctly as possible, stressing only that in-

formation which might be related to the offender's criminality.

a. *Social.* In a few sentences, the caseworker should attempt to identify any areas in the offender's social history which may have contributed to his involvement in crime. This might include the neighborhood, family relationships, marriage, physical, and mental health. Detailed information such as the father's place of birth is not necessary or desirable.

b. *Education.* At this point, the caseworker should provide only a brief statement regarding the offender's response to his educational experience, i.e., his adjustment in school and his achievements.

c. *Military.* Again, only a brief statement regarding the offender's military obligation is required. Comment on his status with the Selective Service Board and response to military experience if applicable, i.e., training, adjustment, discharge.

d. *Employment.* This portion of the Classification Summary should provide a concise summary of the offender's total employment experience. The caseworker should attempt to describe the number and types of previous jobs

held by the offender. Adjustment on the job and significant periods of unemployment should also be explained.

(4) *Current Findings.* During the initial classification process, the offender is tested, given a physical examination, interviewed, and observed to gain additional information about his character, physical and mental health and ability to change. Information obtained from these sources should be summarized under the following headings of Character Traits, Physical and Mental Health and Tests.

a. *Character Traits.* The caseworker should make a brief statement regarding the offender's assets and liabilities related to self-control, interpersonal relationships, standards and values. This statement should be drawn from information received from various departments within the institution regarding the offender's behavior, relationship with others and personal habits. As in all other segments of the Classification Summary, opinions should be avoided and the statement should be based on facts.

b. *Physical and Mental Health.* In most situations, a brief statement of the current findings regarding the offender's physical and mental health will be sufficient. If problems are diagnosed, however, the caseworker should indicate the extent and nature of the problems and comment on employability. If indicated, a more extensive report on mental and physical health can be added to the Classification Study under the section entitled "Optional Pages".

c. *Tests.* Each institution administers a number of tests to measure an offender's current standing and potential for achievement. The results of these tests plus an interpretative summary must be made available to the caseworker so that he can incorporate it in the Classification Summary. The caseworker will list all tests given and summarize what the results mean in terms of training and treatment. Any information which is available regarding testing prior to the offender's arrival at the institution should also be summarized.

6. *STAFF EVALUATION.* The Classification Study has been extended to include a comprehensive staff evaluation. The evaluation will not exceed four paragraphs and generally one typewritten page. This report represents the com-

bined opinion of the Classification Committee or Team and is written in a way which stresses an evaluation of the facts. It will be subjective and judgmental in nature and based on suppositions. Even though it covers some of the same areas as the Classification Summary, the *Classification Summary only reports on facts.* The staff evaluation provided your opinion regarding those facts. The staff evaluation should be reproduced on Classification Form 1b with the date being typed in following the registration number, as indicated on the attached sample.

A. *Illegal Behavior.* In this paragraph, the caseworker should summarize the Classification Committee's or Team's opinion regarding the offender's involvement in crime. Emphasis should be placed on his current attitude regarding the offense, codefendants, his prior record, and pending charges. Some statement regarding his potential for future involvement should also be recorded.

B. *Causal Factors.* The Classification Committee or Team should formulate a theory regarding the offender's criminality and present situation. Such factors as the use of drugs, family problems, health, lack of education and training, emotional and psychiatric problems should be considered and an opinion expressed regarding their probable contribution to the offender's current situation and life style.

C. *Program Goals.* The third paragraph of the Staff Evaluation should provide a summary

of the offender's correctional treatment and training needs and his program plan. Further, a statement regarding his or her willingness to take advantage of the available resources and an estimated time for completing the program should be included.

D. *Release Plans.* The final portion of the Staff Evaluation should give an opinion regarding the offender's release needs, anticipated release date, and parole readiness for commitments under the Youth Corrections Act, 4208 a-2. and the Federal Juvenile Delinquency Act. Available resources should also be evaluated along with the offender's post commitment plans.

7. *OPTIONAL PAGES.* When there are psychiatric, psychological, and/or religious reports, they should be inserted immediately after the Classification Summary.

Psychiatric or psychological reports will be scheduled by the Medical Department when indicated. Such reports should be prepared as a matter of policy in study cases.

While Chaplains will continue to conduct interviews with all newly committed offenders, they will no longer be required to submit reports on all of them. Instead they will prepare for circulation to the team members prior to the meeting, reports on those offenders for whom such reports are appropriate in their judgment. While the spiritual and religious

aspects of the offender's life still receive primary focus, the Chaplains will not limit themselves to these considerations but will also make observations in other areas when they think that such observations might be useful to the team.

8. *PROGRAM ANALYSIS SHEET.* This sheet is arranged so that the information submitted may be computerized and subjected to statistical analysis. As this data accumulates, it will reveal the areas in which our programs are sufficiently staffed and those in which they are not. These facts will be revealed about each institution and about the system as a whole.

It is extremely important that this information be accurately and conscientiously recorded because manpower decisions will be based on it. To this end, there are management control methods that department heads and wardens will need to exercise. The first obvious check is that the Program Plan be in accord with the Analysis Sheet. If discrepancies occur, especially on a regular basis, then one or the other does not give a true picture. Similarly, the totals of the men participating in given programs or achieving particular goals (e.g., the G.E.D. Certificate) should closely approximate the numbers planned for and recorded on the Analysis Sheets. If no relationship exists between plans and outcomes, there is an obvious problem.

It is important to stress that the Central Office is trying to gather accurate information in order to

plan for and justify program resources. The information can serve the same purpose and has the same value for institution management.

A. *Procedures*

(1) For each correctional factor, indicate the *level of need* by entering the Code 0, 1, 2, or 3 in the corresponding box to the right of each category.

(2) For every factor for which no program is planned enter 2 in the corresponding box to the right of the factor. If program is planned enter (1).

(3) If no program is planned enter code or codes indicating constraints (start at left and list to right side). No more than three constraints may be listed.

(4) If program is planned list activity or activities in the corresponding box (no more than five activities for any one factor).

(5) When a program is not available and a substitution is made—e.g., counseling substituted for psychotherapy because no mental health worker is available—indicate by placing [02 55] under constraints and a [10 58] under activities.

(6) For community based program place 62 and then list activity, e.g., [62 50] indicates study release.

B. *Minimum Program Guidelines.* It is required that offenders be programmed according to the following chart:

Category	Minimum Programming
I	Activities for at least 4 factors*
II	Activities for at least 2 factors*
III	No minimum requirement

* The *Same* program activity can be planned to deal with needs present under *one or more* factors.

Adherence to these guidelines and a comparison between the Program Analysis and the Program Strategy will guard against cases being handled perfunctorily.

The completed Program Analysis Sheet will be kept in the inmate's institutional folder; *a copy will be sent to the Bureau's Information Branch.*

9. *PROGRAM PLAN.* The Program Plan continues to be an important guide in establishing an effective treatment program for offenders.

A. The Staff Evaluation paragraph should be deleted, however, and a new paragraph entitled Transfer Recommendation, should be added. If it appears that the offender is not suitably classified for the program at your facility, the paragraph of Transfer should be completed and explain your rationale for moving him to another facility.

B. *Environmental Factors.* The correctional factors to be considered in this area are those of Economic Status and Family Conditions. If the staff decision is to apply treatment resources in these areas, the goals of the treatment shall first be spelled out in such a way that progress can be noted and achievement documented. The program to be followed should be outlined in equally specific terms. The form permits variation of review dates if this is considered advisable.

C. *Health.* This section applies to both mental and physical health. Medical goals are sometimes independent of other treatment goals. However, where possible, these decisions should be integrated with other factors such as sentence length, training programs, transfer plans, etc.

D. *Skills.* Both educational and vocational areas should be considered in this area of planning. If resources are to be applied in either or both areas, the goals should be clearly stated. Relatively speaking, it is easier to state goals in measurable terms in these fields than in most of the others. Both goals and program, therefore should be phrased in measurable concrete terms.

E. *Character Traits.* In this section, we consider the correctional factors of self-control, interpersonal relationships, standards and values, and aspirations. These terms and con-

cepts are the most difficult to deal with in measurable behavioral terms and yet the most vital elements of progress are contained here.

Each classification group must make a continuous, sincere effort to state their goals, and their plans to achieve them, in behavioral terms. From this effort we should reap improved and refined ideas and ways of expressing them.

10. *SPECIAL TYPE OF CASES*

A. *Processing of Commitments for Study under S. 5034, 5010(e), and 4208(b)*

(1) *Delays in Delivery of Study Cases.*

Whenever an offender committed under Section 5034, 5010(e), or 4208(b) is not received by the designated institution within 10 days from the date of the designation made, the Chief, Case Management, at the institution or his delegated representative, shall contact the appropriate United States Marshal's Office by telephone and urge prompt delivery because of the deadlines involved. If the commitment to the institution has not been made within 15 days from the date the designation was made, the institution shall notify the Bureau by telephone, Office of the Assistant Director, Institutional Services Division.

(2) *Requests for Extensions of the Study Period.* Whenever circumstances such as the inability to collect necessary or reliable data within the time limit allotted for the study, need for more extensive psychiatric or medical examination, etc., indicate the necessity for more time than has been provided in the initial commitment, an extension should be requested. However, this should be an infrequent occurence and extensions should be requested only if absolutely necessary. The chief administrative officer of the institution shall request extensions from the sentencing judge, usually not to exceed 30 days. A copy of the letter and subsequent reply should be forwarded under brief cover memo to the Office of the Assistant Director, Institutional Services Division. Since the Bureau maintains control cards on all study cases, we must receive either the study material or notification that it will be late, 30 days prior to the date the recommendations are due in court.

(3) *Preparation of Classification Study.* Particular attention should be given to the following:

a. When it is ascertained that a Presentence Report has not been prepared by the United States Probation

staff, a post sentence report should be requested and every effort should be made to verify and authenticate the information provided by the offender. If information is obtained from the offender, the study report should reflect the source of the material and indicate whether or not it has been verified.

b. In many cases there is a rather obvious reason for the court's request for study. In other cases the purpose is not immediately clear. When there is any doubt in the caseworker's mind regarding the reason for study, he should telephonically contact the United States Probation Officer to clarify the court's concern. Once this has been determined, the study should deal effectively with the areas of the court's concern.

c. The Program Plan and Analysis Sheet (BP 6.1) should be omitted from the study. The Classification Summary will follow the same format used in a regular Classification Summary only it may occasionally be necessary to expand certain segments of the report. The Staff Evaluation will also be the same as that prepared for a regular study and special care should

be taken to assure that it represents the total group judgment of the team or committee.

d. When probation is recommended for certain types of community treatment, we believe it should first be determined that the necessary treatment resources are available in the community. We would encourage telephonic communication with the United States Probation Officer in these cases in order to determine whether your recommendations are realistic. Care should be taken, however, to advise the United States Probation Officer that you are only evaluating potential resources and that a final decision has not been made regarding a recommendation to the court. The availability of resources should be spelled out in the Staff Evaluation section of the report.

e. Specific recommendations as to sentence disposition should be included only in the transmittal memo or letter to the court and should *not* appear anywhere in the classification study.

f. Study cases should be assembled as follows: Face Sheet (Record Form BP 5.1); Record Form 16; Staff

Evaluation; Classification Summary; Psychiatric, Psychological, and Religious Reports; Form BP 6, Social Data; Form BP7, Educational Data; and BP 8, Medical and Related Data.

g. It is imperative that we prepare comprehensive, well-organized, well-integrated, and well-written classification studies on all offenders committed by the court for study and observation. Particular care should be taken in regard to appearance, grammar, clarity of style, and material consistency. Also, special attention should be given to providing clear and legible copies of the study for submission to the court. All material in the study should be reproduced in the same manner.

(4) *Transmittal of Classification Study and Institutional Recommendations to the Bureau on 4208(b), 5034, and 5010(e) Study Commitments.*

a. Five copies of the classification study and one copy of the Presentence or Post Sentence report shall be submitted to the Bureau, Office of the Assistant Director, Institutional Services Division, as promptly as possible. In 4208(b) commitments, this material will be submitted within 60 days from the date commitment was imposed, unless an extension has been requested and granted. In 5034 and 5010(e) commitments, material will be submitted within 45 days from the date commitment was imposed, again, unless an extension was requested and granted. Although a specific period of time is allotted for studies (90 days for 4208(b), (60 days for 5034 and 5010(e), it is not necessary that the allotted time be used. Expeditious preparation and submittal of study cases is encouraged, regardless of the amount of time provided by the statutes.

b. In 4208(b) and 5034 cases, the institution recommendations shall be forwarded in the form of a single spaced letter to the sentencing judge for the signature of the Director, Bureau of Prisons. In the past this has been in the form of a draft letter. However, this policy is being discontinued and the letter should be of such high quality that it can be forwarded directly to the Director for his signature.

c. Each institution should maintain a file containing copies of Bureau study

case letters, forwarded to the courts, for training purposes. Special attention should be given to the outline and structure of these letters. Additionally, letters to the court should flow logically from the Staff Evaluation and should be written in a concise, straightforward style. Jargon and theorizing should be avoided. Since a summarization of pertinent factors will have been done in the Staff Evaluation, the main function of the letter is to convey a specific recommendation to the court as to disposition and to briefly outline plans for training and treatment. The treatment plan should support the recommendation. It should not exceed one page in length (single-spaced) and the letter should be undated.

d. In 5010(e) cases, the Chairman of the Youth Division, United States Board of Parole makes the recommendation to the court. However, the institution recommendation shall be forwarded to the Bureau by a cover memorandum summarizing the staff's recommendations for disposition and their suggestions for specialized treatment and training.

e. The institution staff, particularly the caseworker who drafted the initial letter in 4208(b) and 5034 study cases, should review the copy of the Bureau's final letter to the court. Similarities and differences should be noted. Perhaps, in this way we can all address ourselves to similar issues and approach a common style.

* * * *

APPENDIX C

The Bureau of Prisons Policy Statement No. 7300.13D, on Delegation of Transfer Authority, dated June 19, 1974, provides in relevant part:

1. *POLICY.* The Bureau of Prisons attempts to place all committed offenders in the correctional facility for which he is most appropriately classified in terms of age, place of residence, offense, sentence, and prior record.

2. *PURPOSE.* In order to achieve this policy, the Director has delegated the authority to transfer offenders from one institution to another to the Chief Executive Officer of each federal facility. The authority to transfer men from one federal institution to another or to an approved non-federal facility is delegated to assure expeditious movement to an institution for which the offender more properly classifies.

* * * * *

5. *GENERAL GUIDELINES*

a. Generally, transfer consideration is most appropriately given at the time of intake screening, initial classification, or at regularly scheduled reviews.

b. A significant number of transfers will be for the purpose of placing newly committed offenders in institutions for which they more properly classify. To provide classification committees and teams with current information as to the mission of each federal institution, there is attached to this delegation Appendix A, which describes the population characteristics, commitment areas, security limitations, and significant program resources of each institution. The overall integrity of this classification system must be preserved.

c. At initial classification the staff should attempt to plan a complete program throughout the entire period of confinement, including institutional and post-release planning. In making this plan, all the resources of the service should be considered and this delegated transfer authority used to place the offender into the setting which will be most useful to him in his total correctional program.

d. When it is apparent that the correctional treatment needs of the offender will be best served, or the continuity of his training and treatment program maintained, or because the resources of the institution are not adequate to meet the problems presented by him, then the Chief Executive Officer may issue an order directing the transfer of the offender to an appropriate facility following the guidelines in Appendix A, and subject to the limitations in paragraph 6a-6r. (For transfer to Community Centers see section 6-s).

e. In the exercise of this transfer authority, the Chief Executive Officer must be particularly

alert to the limitations regarding the place of confinement for misdemeanants, juveniles, youths, addicts and mentally-ill offenders.

6. *LIMITATIONS AND REGULATIONS*

a. State prisoners and prisoners from the District of Columbia serving sentences under contract in our institutions may not be transferred from one institution to another without prior approval. The usual progress reports and recommendations shall be forwarded on all state boarders to the Population Control Unit in the Bureau. District of Columbia prisoners will be referred to and accepted by the receiving institution.

b. Individuals committed to custody under the provisions of the *Federal Juvenile Delinquency Act* may be transferred under this delegation of authority to another juvenile or youth institution, following their initial parole hearing, without referral to the Regional Case Management Branch. When transfer to another type institution appears indicated, the recommendation will be forwarded to the Regional Case Management Branch. (See paragraph 6, r(2) for exception).

c. *Youth Corrections Act* commitments shall be classified at the receiving institution, where the initial parole hearing will also be given. Following this hearing, or at any appropriate time thereafter, the youth offender may be

transferred by delegated authority to another more appropriate youth institution without referral to the Regional Case Management Branch. Youth offenders recommended for an adult correctional facility at the time of initial classification or at any later date, shall be recommended for transfer to the Regional Case Management Branch (See paragraph 6, r(2) for exceptions.)

Any youth offender, having once been authorized for transfer to an adult Federal Correctional Institution, may be transferred under delegated authority to some other, more appropriate, adult FCI.

Any youth offender, having once been authorized for transfer to a penitentiary may not be transferred to another penitentiary under delegated authority and must be approved by the Regional Case Management Branch.

d. Generally, those offenders who are in the process of being transferred and are in holdover status (at neither the sending nor receiving institution), should not be diverted from the intended receiving institution. If, by reason of their adjustment, or other extenuating circumstances, they should not be moved to the receiving institution, referral should be made to the Regional Case Management Branch. In any event, holdovers must be monitored to insure expeditious movement and juveniles and

youths in transit must not be held in a penitentiary for more than 24 hours.

e. Due to critically high population levels it may occasionally be necessary for the Central Office to declare a *moratorium* on selected institutions. If an institution has an offender in "holdover" status while enroute to an institution which has been selected for a moratorium, the holding institution is instructed to allow the offender to complete the transfer. In this same light, if one institution has an offender who they believe to be properly classified for another facility which has been placed under a moratorium, the two Chief Executive Officers are authorized to individually confer about these selected individuals regarding the transfer.

f. All recommendations for transfer to the Medical Center for Federal Prisoners, Springfield, and FCI, Lexington, Kentucky, for either psychiatric or medical care shall be cleared with the Director, Medical Center, or the Chief Executive Officer, Lexington, Kentucky or authorized representative, prior to effecting the transfer. Upon their advice that facilities are available, and that the case is suitable for moving the patient to the Medical Center, or the Lexington Hospital, the transfer may be effected. Generally referrals shall be made to the Director, Springfield, or Chief Executive Officer, Lexington on the basis of a progress

report, including such medical reports as are necessary to making an informed decision. In emergency situations, telephone communications may be made for the purpose of expediting the transfer.

The Director of the Medical Center, the Chief Executive Officer, Lexington, is delegated authority to issue transfer orders to return hospital patients, both medical and psychiatric, upon recovery, to any appropriate institution, subject to the broad guidelines of this delegation of authority. In some instances, it will be highly desirable to communicate with the prospective receiving institution prior to issuance of a transfer order. Unusually complicated situations should be referred to the Regional Case Management Branch.

g. NARA, Title II cases remain at the institution where they are committed unless specific authorization is granted. Recommendations require a full progress report and should be forwarded to the Assistant Director, Correctional Programs Division.

h. Transfer to local hospital. When a determination is made that an inmate requires emergency in-patient care and should be admitted to a community hospital or government hospital other than one operated by Bureau of Prisons, and for some good reason the Medical Center at Springfield would not be advisable,

the Chief Executive Officer of the institution is authorized to issue an order transferring custody of the prisoner to the U.S. Marshal in whose District the hospital is located.

Since these transfers are frequently made hastily and for emergency reasons, the Marshal should be notified by telephone, at which time he will be advised regarding the degree of supervision the Warden believes is necessary. This information should be confirmed in a memorandum covering the transfer order when it is sent to the Marshal. When the institution is notified that the hospital is ready to discharge the patient, the Warden should issue another transfer order retransferring the patient from the Marshal to the institution.

Whenever in-patient care in a local hospital is considered advisable, and no emergency is involved, the advice of the Medical Director, Division of Health Services, will be obtained prior to issuance of the transfer authorization.

Under these conditions, the Marshal is responsible for paying the costs of hospitalization and treatment. He is also responsible for providing supervision if he determines this is needed. The institution should cooperate with the Marshal by providing supervision until the Marshal is able to arrange for such guards as may be needed.

The cover memorandum which accompanies the transfer order to the Marshal shall include the following paragraph:

"Pursuant to authority delegated to me by the Director, Bureau of Prisons, this is your authority to accept custody of the above-named for commitment to the hospital indicated in the transfer order. By this memorandum, you are authorized to pay the hospital expenses. Please forward the usual jail record cards (Form DJ-100) showing commitment to and discharge from the hospital."

The Bureau copy of the cover memorandum should be marked for the attention of the Medical Director, Division of Health Services, Bureau.

i. *Volunteer Research Projects.* Subject to criteria established by the Assistant Director, Correctional Programs Division in cooperation with the staff of each research facility, the Chief Executive Officer of the institution is authorized to issue orders for transfer to and return from such facility for participation in the research project. Any questions concerning suitability of a particular individual for any project should be referred to the Regional Case Management Branch.

j. *Community Centers*

(1) The authority to effect transfers to and from Community Treatment Centers has been delegated to the Chief Executive Officer of the institutions and centers involved. Transfer authority for directors of non-federal facilities is limited to placing an offender in the custody of the nearest U.S. Marshal.

(2) Community Treatment Centers established to provide assistance to offenders who do not have independent resources and who would find it difficult to adjust in the community without the services of the Center. Priority consideration should be given to those individuals who lack a job, a place to live or the necessary self confidence to develop resources on their own. Community Centers are not intended to be used as a reward or solely as a means of returning an offender to the community earlier than the time established by the expiration of his sentence or a parole date. Therefore, transfers should only be approved when it is apparent that utilization of the Center's resources might have a positive impact on an individual's ability to avoid future illegal behavior. In addition, when reviewing a request for transfer to a Community Treatment Center the following eligibility criteria should be followed:

(a) Generally, individuals should be within six months of their release date. Plans for greater program duration should be discussed with the CTC Director prior to transfer;

(b) Generally, individuals who have been convicted of violations of *financial trust* or of an organized, sophisticated offense have little need for CTC programs. If there is reason to consider violation of financial trust, they may be approved by the Warden or Chief Executive Officer, but a special memorandum must be written for the file giving the rationale for approval of the CTC placement. Individuals who have been involved in organized, sophisticated offenses are to be referred to the Central Office for approval.

(c) Those individuals convicted of, or charged with serious or repetitive crimes of violence against a person are generally excluded from CTC programs. If there is reason to consider such an individual, they may be approved by the Warden or Chief Executive Officer, but a special memo-

randum must be written for the file giving the rationale for approval of the CTC placement. Such clearance must be obtained *prior* to preliminary contacts with the CTC. Any individual in this category who has been granted parole by the United States Board of Parole, except to a detainer, does not need Central Office Clearance.

(3) Because of the limited capacity and unique nature of community centers. no transfer into a center shall be effective prior to receipt of advice from the Center Director that space is available. FJDA and YCA offenders will ordinarily not be transferred into a Center until the Youth Division of the United States Board of Parole has set a release date, or until the youthful offender is within 120 days of his release.

k. *Misdemeanants*, i.e., those offenders who have been convicted of offenses for which the maximum penalty is one year or less, may not be transferred to penitentiary-type institutions without first obtaining a waiver, Record Form No. 37. Having obtained a waiver, the general delegation of authority may be used as appropriate.

l. Offenders committed to custody under the *split sentence* provisions of Title 18, U. S. Code, Section 3651, may not be transferred to penitentiaries without prior approval of the Regional Case Management Branch.

m. *Separation Cases & Special Offenders.* When it becomes necessary to separate individuals due to codefendant animosity, cooperation with government officials, or to keep potentially serious escape risks apart or when the individual is a notorious offender because of the organized, sophisticated nature of the offense, or when the offense has received considerable publicity, their cases must be referred to the Assistant Director, Correctional Programs Division for review and stamping with the notation "the inmate may not be transferred without prior Bureau approval per Policy Statement 7300.13C." When the transfer of such an individual is considered necessary, the transfer recommendation shall be referred to the Population Control Section in the Central Office. Also, when the location of codefendants is not known, inquiry should be made of this same office.

n. All transfer recommendations for the concurrent service of federal and state sentences shall be referred to the Regional Case Management Branch, after it is determined that a state will accept the offender. (Except Cali-

fornia cases—refer directly to Terminal Island).

All transfer recommendations for boarding federal offenders in non-federal correctional facilities, except residential community treatment centers, shall be referred to the Regional Case Management Branch. When a state placement has been approved, the referring institution must forward to the state facility a copy of the Judgement and Commitment, sentence data with adjustments for extra or forfeited good time, and file material. A copy of the sentence data, (with instructions to place a detainer) with the above listed adjustments, shall also be forwarded to the U.S. Marshal in the district in which the state facility is located and to the Population Control Office in the Central Office.

o. Offenders having *detainers, and probable pending charges,* may be transferred under this delegation of authority to an institution for which they properly classify. Ordinarily, persons in this category should not be moved to an institution more distant from the detaining authority unless there is substantial reason to believe that the detainer will be dropped, or that the pending charge will not be prosecuted. Inmates who indicate an intention to oppose extradition should not be moved under this delegated authority into an institution within

the state responsible for placing the detainer. Such cases, and others in which there are legal and/or jurisdictional problems, should be referred to the Regional Case Management Branch. Also, Policy Statement 7500.14a should be reviewed concerning this type of transfer.

p. When consideration is being given to making a transfer which will place an offender in an institution for which the offender is not properly classified under ordinary standards, or when an offender is being considered for transfer because he is a particularly difficult problem, the Chief Executive Officer will send a copy of the progress report to the Chief Executive Officer of the proposed receiving institution for his comments and concurrence. If they are not able to achieve agreement, the matter will be referred to the Regional Case Management Branch. Copies of institution correspondence about the case should be forwarded.

q. *If a group disturbance occurs,* it may be necessary to move some of the participants. After the Chief Executive Officer has made his decisions regarding transfer, he should thereafter confer with the Regional Director, who will contact the Assistant Director, Correctional Programs Division, regarding disposition of those inmates most seriously involved. This will insure that the Director is informed re-

garding the resolution of the incident, that overall needs of the Prison Service are taken into account, and that transportation is arranged promptly.

r. *Relationship with Other Agencies*

(1) In transferring an offender for release planning purposes, the impact of this action on the work of the U.S. Probation Officer must be taken into account. When there is reason to doubt regarding the offender's claim to residence, and/or release resources, at the proposed destination, the approval of the receiving Probation Officer will be received before issuing the transfer order.

(2) The rules of the United States Board of Parole require initial hearings for offenders committed under FJDA, YCA, or Section 4208(a)(2). Unless there is definite airlift or bus schedule information to show that the offender can be transferred and receive his initial hearing on as early a date as he would have at the transferring institution, transfer should be deferred until the hearing is completed.

Persons awaiting mandatory release or parole violator hearings *should not* be moved until after the hearing has been completed.

The Board of Parole should be kept fully and promptly advised of transfer activity on persons awaiting parole decisions and on those who have been granted parole dates. Those scheduled for Parole Board or Youth Division hearings within 60 days should not be transferred until after the hearing is completed. Special circumstances which might necessitate exceptions to this rule should be cleared with the Board or Division ahead of time.

(3) The Chief Executive Officer will assure himself that any complicating jurisdictional and legal problems are resolved before transfer is accomplished. Thus, an offender who has legal action pending should not be transferred without prior consultation with the appropriate court.

7. *PROCEDURES*

a. Ordinarily, a decision to transfer an offender should be made at initial classification, or at another regularly scheduled review, for which a complete progress report is prepared. Occasionally, transfer action will be necessary as a result of some unanticipated or emergency circumstance. At such time, a special progress report bringing the entire case up to date, should be prepared. Whenever a full progress report was prepared within 90 days of trans-

fer consideration, a memorandum report, bringing the case up-to-date will suffice.

b. Each institution is authorized to duplicate blank transfer authorizations. An original and one copy of each order are necessary. (Institutions may wish to prepare an additional copy for their own statistical purpose, but this is not required by this regulation.) A number of federal courts have held, in prosecutions for escape, that the Government must prove the legality of commitment by competent evidence.

In order to have the requisite documentation readily available, the "Return of Service" will be executed on the original of the transfer order. Also, in all transfers to Community Treatment Centers, federal or contract non-federal, and in all transfer to non-federal work-release facilities, each copy of the transfer order shall carry the typed notation "This transfer is effected under the provisions of paragraph (c), Section 4208, Title 18, U.S.C." Therefore, as a transfer movement begins, the original transfer order will be placed in an envelope stapled to the A/W control card and attached to the outside of the Messenger Envelope (Std. Form 65) containing the complete inmate file. The officer who completes the transfer at final destination will execute the "Return of Service" on the original transfer order, and this will be filed with the commitment papers.

One copy of the transfer order will be placed inside the central file folder upon departure along with the usual material which includes the rationale for transfer. This will serve as the file copy for the receiving institution.

The Central Office has previously required a copy of the transfer order for Bureau file. This will no longer be necessary. Additionally, the 3″ x 5″ card and a memo to the Assistant Director, Correctional Programs Division, will no longer be forwarded to the Central Office.

c. The reason for transfer, according to the following code, should be shown on the original and each copy of the transfer order. It is recognized that there may sometimes be overlapping reasons for the transfer. In such instances, please show the primary reason. With the exception of Code 290, all transfers must be referred to and accepted by the receiving institution. District of Columbia offenders are not to be transferred under Code 290.

Code

290 *Institution Classification.* (This reason is most appropriate for transfers made at initial classification, and will usually involve transfer to an institution of a different type.)

291 *Nearer Release.* (This reason will be used when transfer is made to an institution nearer the offender's release destination, either at time of initial classification or at a later date.)

292 *Adjustment Purposes.* (This reason will ordinarily be used when the inmate is moved prim-

Code

arily for the purpose of providing closer supervision and controls, and is related to poor institutional adjustment).

293 *Closer Custody.* (This reason will be used when custody, in terms of escape, is the primary concern).

294 *Medical Attention.* (This includes persons moved for medical and psychiatric care, surgery, and narcotic addiction).

295 *Medical Treatment Completed.*

297 *Training Purposes.* (Transfer made for participation in a specific training program, as dental laboratory at Lewisburg, machine die and tool at El Reno, etc.).

298 *Work/Study Release.* (When transfer is made specifically for participation in work-release program at receiving institution).

299 *Community Centers.* (All transfers into guidance centers or other community residential centers shall be coded here).

300 *Temporary transfer* to custody of U. S. Marshal or local authority.

301 *To Relieve Overcrowding.*

302 *To Build Up Population.*

304 *Drug Abuse Program.* (Non-Nara)

305 *Other.*

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APPENDIX D

The Bureau of Prisons Policy Statement No. 7300.65, on Designation of Institutions for Confinement of Federal Prisoners, dated March 22, 1972, provides in relevant part:

1. *PURPOSE.* This statement establishes the guidelines for the United States Marshal's Service in designating appropriate institutions for individuals convicted of violating the laws of the United States.

2. *POLICY.* The program of classification of prisoners is based upon the following statement of policy established by Congress (18 U.S.C. 4081):

> "The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions."

The statutes further provide that persons convicted of offenses against the United States shall be committed, for such terms of imprisonment as the court may direct, to the custody of the Attorney General or

his authorized representative, who shall designate the place of confinement where sentence shall be served. The Attorney General may designate any available, suitable and appropriate institution, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted (18 U.S.C. 4082).

* * * * *

4. *PROCEDURE.* Designation of institutions for the commitment of Federal prisoners is made by the Director of the Bureau of Prisons under the authority delegated to him by the Attorney General. Specific institutions are designated for particular types of offenders.

A. *Juveniles*: Robert F. Kennedy Youth Center, Morgantown, West Virginia

B. *Females*: Federal Reformatory for Women, Alderson, West Virginia
Federal Correctional Institution, Fort Worth, Texas
Federal Correctional Institution, Terminal Island, California
Robert F. Kennedy Youth Center, Morgantown, West Virginia

C. *Youth and Young Adult Males*, sentenced under the Youth Corrections Act or sentenced under other statutory provisions, who lack previous commitments to adult reformatories or prisons and can reasonably be expected to profit from educational, vocational and other rehabilitation facilities available:

Federal Youth Center, Ashland, Kentucky
Federal Reformatory, El Reno, Oklahoma
Federal Youth Center, Englewood, Colorado
Federal Correctional Institution, Lompoc, California
Federal Correctional Institution, Milan, Michigan
Federal Reformatory, Petersburg, Virginia
Federal Correctional Institution, Seagorville, Texas
Federal Correctional Institution, Tallahassee, Florida

D. *Males*, who, because of age or previous criminal record, are unsuitable for youth institutions or reformatories, but who are not habitual or professional offenders and who still present prospects for rehabilitation through an intensive program of training:

United States Penitentiary, Lewisburg, Pennsylvania
United States Penitentiary, McNeil Island, Washington
United States Penitentiary, Terre Haute, Indiana

E. *Males* with serious criminal records:

United States Penitentiary, Atlanta, Georgia

United States Penitentiary, Leavenworth, Kansas

F. *Males* who are treatable, do not have a serious prior criminal record, require no more than medium custody facilities, and whose sentences may range from a few months to no more than five years:

Federal Correctional Institution, Danbury, Connecticut
Federal Correctional Institution, Fort Worth, Texas
Federal Correctional Institution, LaTuna, Texas
Federal Correctional Institution, Sandstone, Minnesota
Federal Correctional Institution, Terminal Island, California
Federal Correctional Institution, Texarkana, Texas

G. *Males* of minimum custody of trustworthy type in good physical condition with relatively short sentences:

Federal Prison Camp, Allenwood, Pennsylvania
Federal Prison Camp, Eglin Air Force Base, Florida
Federal Prison Camp, Lompoc, California
Federal Prison Camp, McNeil Island, California

Federal Prison Camp, Montgomery, Alabama (Maxwell Air Force Base)
Federal Prison Camp, Marion, Illinois
Federal Prison Camp, Safford, Arizona
Federal Prison Camp, Springfield, Missouri

H. *Males* awaiting trial or serving short jail sentences:

Federal Prison Camp, Florence, Arizona
Federal Detention Headquarters, New York, New York

I. *Males* who require specialized medical or psychiatric treatment which is not available in other Federal institutions:

Medical Center for Federal Prisoners, Springfield, Missouri

5. *CLASSIFICATION OF OFFENDERS.* The types of Federal offenders, for purposes of the designation charts, are classified as follows:

A. *Juvenile and Youth Offenders*

A-1. Juveniles include all persons (1) committed under the Juvenile Delinquency Act (Title 18, U.S. Code, Section 5034), (2) all other committed persons who have not yet reached their eighteenth birthday.

A-2. Youth offenders include all persons committed under the Youth Corrections Act (Title 18, U.S. Code, Section 5010(b), 5010(c)).

A-3. All persons under 24 years of age who do not come within either A-1 or A-2 classification. Persons in this age group include those committed for observation and study under Title 18, U.S. Code, Section 5034 and 5010(e), and those under 24 years of age committed under Title 18, U.S. Code, Section 4208(b), Title II of NARA, Sections 4252 and 4253, and 4244 and 4246.

B. *Females*

B-1. Females with a term of less than 90 days to serve.

B-2. Females with a term of more than 90 days to serve.

B-3. Females committed for observation and study under Title 18, U.S. Code, Section 5010 (e), 4208(b), 5034, 4244, 4246, and Title II of NARA, Sections 4252 and 4253.

C. *Males—One year and one day sentence or less*

C-1. Males considered trustworthy, with no record of escape, no detainers (with the exception of deportation), no record of sex crimes, and good physical condition.

C-2. Males who do not qualify under C-1.

D. *Males—More than one year and one day sentence*

D-1. Males 24 years of age and over who are considered to be good prospects for rehabilitation. Exclude men who have already served more than two terms longer than one year in adult institutions, and men with sentences longer than ten years.

D-2. Males 24 years of age and over who do not qualify under D-1, but are still considered good prospects for rehabilitation. Initially they may be considered moderate security risks.

D-3. Males considered habitual or professional criminals. Also those considered serious escape risks and who require close control and supervision. Ordinarily, this category will only include men age 30 and over.

E. *Selective Service Act Violators.* Males who have violated the Selective Service Act Law. This includes those whose actions are not necessarily religiously motivated.

6. *SPECIAL DESIGNATIONS.* The following should be referred to the Bureau of Prisons for special designation.

• • • •

A. All offenders committed under the Federal Juvenile Delinquency Act (Title 18, U.S. Code, Section 5034).

B. All persons committed for study and observation (Title 18, U.S. Code, Sections 4208(b), 5010(e), 5034, and Title II of NARA, Sections 4252 and 4253.

C. All serious medical and psychiatric problems.
D. All commitments under Title 18, U.S. Code, Section 4244 and 4246.
E. Offenders for whom the Court or the U.S. Attorney have recommended a specific institution.
F. Offenders who should be separated from others or for some other substantial reason should not be placed in the institution specified in the designation chart.
G. Notorious or greatly publicized offenders.
H. Any person about whom there is doubt as to proper designation.
I. All violators of post-release supervision, I.E., Parole Violators and Mandatory Release Violators. (Notify U.S. Board of Parole, Adult Board or Youth Corrections Division, pursuant to the long standing instructions of the Board.)

When a special designation is requested, presentence reports should be forwarded to the Bureau of Prisons and/or the institution designated in accordance with the procedures established in the particular judicial district. Special designations should be coordinated with the local probation office as to eliminate duplication in requesting special designation.

* * * * *

APPENDIX E

The Bureau of Prisons Policy Statement No. 7400.5C, on Inmate Discipline, dated October 4, 1974, provides in relevant part:

1. *PURPOSE.* This statement of policy is to assure that inmate discipline and control are fully consonant with the correctional objectives of the institution, the focus being on (a) individual inmate adjustment to the programs, behavior standards, and limitations necessarily imposed by the administration; (b) the general welfare and safety of the institutional community; and, (c) the incorporation of due process standards for inmate disciplinary hearings as prescribed by the Supreme Court in *Wolff* v. *McDonnell*, —— U.S. ——, 94 Ct. 2963, —— L.Ed 2d —— (1974).

* * * *

3. *POLICY.* It is the policy of the Federal Bureau of Prisons to maintain an institutional climate in all of its facilities so that every inmate may complete his term of confinement with a minimum of corrosive effect and a maximum gain in his ability to more adequately maintain a successful community adjustment following release. In order that the majority of inmates might live in a safe and orderly environment, it is necessary that those individuals whose behavior is in noncompliance with institution rules be brought to the attention of the appropriate authorities.

Disciplinary action is but one factor in correctional treatment and control. There are other individualized correctional programs and goals that shall be given consideration by the administration. The objective of this approach is the future voluntary acceptance of institution regulations which are required for the general welfare of the institution community and serve as an aid to law-abiding behavior following release.

4. *ACTION.* A single Institution Discipline Committee will be established in each Bureau of Prisons Institution. The Committee will be composed of at least three (3) members, of whom two (2) will be of department head level or above; the Chairman will be of the level of department head or above. This requirement as to the level of members will not apply to Community Treatment Centers or Camps.

The Chief Executive Officer of each institution will delegate to the Institution Discipline Committee the authority to order an inmate placed or retained in disciplinary segregation, to order the withholding or forfeiture of good time, and to order an inmate transferred for disciplinary reasons. The authority to impose sanctions other than disciplinary segregation, withholding or forfeiture of good time and transfer for disciplinary reasons will be lodged in such person or persons as the Chief Executive Officer may direct. Where the institution has a unit management system, the authority to impose these lesser

sanctions will be delegated to staff members in the inmate's unit.

Each institution having the need for facilities to house inmates separate from the general population will establish special housing units consisting of two types: Administrative Detention and Disciplinary Segregation.

An inmate may be placed in Administrative Detention where his attitude and conduct indicate that his continued presence in the general population poses a serious threat to life, property, himself, staff, other inmates or the security of the institution, and where the inmate:

(a) Is pending a hearing for violation of institution rules or regulations;
(b) Is pending an investigation of a violation of institution rules or regulations;
(c) Is pending investigation or trial for a criminal act;
(d) Requests admission to the administrative detention area for his own protection; or
(e) Is in holdover status during transfer;
(f) Pending classification.

An inmate may be placed in disciplinary segregation where his continued presence in the general population poses a serious threat to himself, staff, or other inmates or to the security of the institution and where the Institution Discipline Committee directs following a hearing conducted in accordance with

the limited due process requirements as outlined in paragraph 9 of this policy statement in which the inmate has been found to have committed a serious violation of institution rules or regulations.

5. *GENERAL PRINCIPLES.* The following general principles shall be applicable in every disciplinary action taken:

(a) Disciplinary action shall be taken at such times and in such measures and degree as is necessary to regulate an inmate's behavior within acceptable limits;

(b) Inmate behavior shall be controlled in a completely impartial and consistent manner;

(c) Disciplinary action shall not be capricious, retaliatory, or for the purpose of revenge.

(d) Corporal punishment of any kind is strictly prohibited.

(e) Accurate, detailed reports of disciplinary actions shall be maintained in accordance with the requirements of this policy statement.

6. *INFORMATION TO INMATES.* Each inmate is to be advised in writing at the time of arrival at an institution of:

(a) His rights and responsibilities;

(b) Acts prohibited in the institution;

(c) The types of disciplinary action which may be taken; and

(d) The disciplinary system within the institution.

This information will be provided in booklet or pamphlet form as part of the admission orientation program. A signed receipt will be obtained from each inmate acknowledging that he has received a copy of the booklet or pamphlet.

(e) *Rights and Responsibilities*

RIGHTS	RESPONSIBILITIES
1. You have the right to expect that as a human being you will be treated respectfully, impartially, and fairly by all personnel	1. You have the responsibility to treat others, both employees and inmates, in the same manner.
2. You have the right to be informed of the rules, procedures, and schedules concerning the operation of the institution.	2. You have the responsibility to know and abide by them.
3. You have the right to freedom of religious affiliation, and voluntary religious worship.	3. You have the responsibility to recognize and respect the rights of others in this regard.
4. You have the right to health care which includes nutritious meals, proper bedding and clothing, and a laundry schedule for cleanliness of the same, an opportunity to shower regularly, proper ventilation for warmth and fresh air, a regular exercise period, toilet articles and medical and dental treatment.	4. It is your responsibility to not waste food, to follow the laundry and shower schedule, to maintain neat and clean living quarters, and to seek medical and dental care as you may need it.
5. You have the right to visit and correspond with family members, and friends, and correspond with members of the news media in keeping with the facility rules and schedules. You also have a	5. It is your responsibility to conduct yourself properly during visits, to not accept or pass contraband, and to not violate the law through your correspondence.

RIGHTS	RESPONSIBILITIES
right to uncensored and uninspected out going correspondence with members of the news media through the Prisoners' Mail Box System. Letters forwarded to the news media through PMB are subject to the regulations of that System.	
6. You have the right to unrestricted and confidential access to the courts by correspondence (on matters such as the legality of your conviction, civil matters, pending criminal cases, and to conditions of your imprisonment).	6. You have the responsibility to present honestly and fairly your petitions, questions, and problems to the court.
7. You have the right to legal counsel from an attorney of your choice by interviews and correspondence.	7. It is your responsibility to use the services of an attorney honestly and fairly.
8. You have the right to participate in the use of law library reference materials to assist you in resolving legal problems. You also have the right to receive help when it is available through a legal assistance program.	8. It is your responsibility to use these resources in keeping with the procedures and schedule prescribed and to respect the rights of other inmates to the use of the material.
9. You have the right to a wide range of reading material for educational purposes and for your own enjoyment. These materials may include magazines and newspapers sent from the publishers.	9. It is your responsibility to seek and utilize such materials for your personal benefit, without depriving others of their equal rights to the use of this material.
10. You have the right to participate in education, vocational training, and employment as far as resources are available, and in keeping with your interests, needs, and abilities.	10. You have the responsibility to take advantage of activities which may help you live a successful and law abiding life within the institution and in the community. You will be expected to abide by the regulations governing the use of such activities.

(f) *Prohibited Acts in Federal Penal and Correctional Institutions*

001	Killing
002	Assaulting any person
003	Fighting with another person
004	Threatening another with bodily harm, or with any offense against his person or his property
005	Extortion, blackmail, protection: demanding or receiving money or any thing of value in return for protection against others, to avoid bodily harm, or under threat of informing
051	Engaging in sexual acts with others
052	Making sexual proposals or threats to another
053	Indecent exposure
101	Escape
102	Attempting or planning escape
103	Wearing a disguise or mask
151	Setting a fire
152	Destroying, altering, or damaging government property, or the property of another person
153	Stealing (theft)
154	Tampering with or blocking any locking device
155	Adulteration of any food or drink
201	Possession or introduction of an explosive or any ammunition
202	Possession or introduction of a gun, firearm, weapon, sharpened instrument, knife, or unauthorized tool
203	Possession, introduction, or use of any narcotics, narcotic paraphernalia, drugs, or intoxicants not prescribed for the individual by the medical staff
204	Misuse of authorized medication
205	Possession of money or currency, unless specifically authorized
206	Possession of property belonging to another person
207	Loaning of property or anything of value for profit or increased return

208 Possession of any thing not authorized for retention or receipt by the inmate, and not issued to him through regular institutional channels
209 Possessing any officer's or staff clothing
210 Possessing unauthorized clothing
211 Mutilating or altering clothing issued by the government

251 Rioting
252 Encouraging others to riot
253 Engaging in, or encouraging, a group demonstration
254 Refusing to work, or to accept a program assignment
255 Encouraging others to refuse to work or participate in work stoppage
256 Refusing to obey an order of any staff member
257 Violating a condition of furlough

301 Unexcused absence from work, or any assignment
302 Malingering, feigning an illness
303 Failing to perform work as instructed by a supervisor
304 Insolence towards a staff member
305 Lying or providing a false statement to a staff member
306 Conduct which disrupts or interferes with the security or orderly running of the institution

351 Counterfeiting, forging, or unauthorized reproduction of any document, article or identification, money, security, or official paper

401 Participating in an unauthorized meeting or gathering
402 Being in an unauthorized area

451 Failure to follow safety or sanitation regulations
452 Using any equipment or machinery which is not specifically authorized
453 Using any equipment or machinery contrary to instructions or posted safety standards

501 Failing to stand count
502 Interfering with the taking of count

551 Making intoxicants
552 Being intoxicated
553 Smoking where prohibited
554 Using abusive or obscene language

601 Gambling
602 Preparing or conducting a gambling pool
603 Possession of gambling paraphernalia

651 Being unsanitary or untidy: failing to keep one's person and one's quarters in accordance with posted standards
652 Tattooing or self-mutilation

701 Unauthorized use of mail or telephone
702 Unauthorized contacts with the public
703 Correspondence or conduct with a visitor in violation of posted regulations

751 Giving or offering any official or staff member a bribe, or any thing of value
752 Giving money or any thing of value to, or accepting money or any thing of value from; another inmate, a member of his family, or his friend

801 Attempting to commit any of the above offenses, aiding another person to commit any of the above offenses, and making plans to commit any of the above offenses shall be considered the same as a commission of the offense itself

7. *INCIDENT REPORT AND INVESTIGATION.*

(a) *Incident Report*: Informal resolution of incidents involving violations of institution rules or regulations is encouraged. However, where an employee witnesses or has a reasonable belief that a violation of institution rules or regulations has been committed by an inmate, and where the employee deems that informal resolution of the incident is unwarranted, the employee shall prepare an incident report and forward it to the appropriate correctional supervisor. The appropriate correctional supervisor may in-

formally dispose of the incident report or forward the incident report for further disposition consistent with this policy statement.

The reporting employee should complete Part 1 of the incident report immediately. The incident is to be one of the Prohibited Acts listed in paragraph 6(f) of this policy statement. The entire language of the Prohibited Act(s) does not have to be copied. Only the relevant portion need be used. For example, "Destroying Government Property, Code No. 152," "Possessing narcotics, Code No. 801" would be acceptable listing for appropriate charges.

The description of the incident should contain the details of the activity which is being reported. All facts about the incident which are known by the employee should be recorded. If there is anything unusual about the inmate's behavior, this should be noted. The reporting employee should also list any staff or inmate witnesses to the incident, and the disposition of any physical evidence (weapons, property, and etc.) which the employee may have personally handled. The reporting employee will sign the report and indicate his title in the appropriate blocks. The incident report should then be forwarded to the appropriate correctional supervisor for disposition.

(b) *Investigation*: The investigation should be conducted within 24 hours of appointment of the investigator, unless circumstances beyond the control of the investigator intervene. The investigating officer should ordinarily be an employee of supervisory level and may not be the employee reporting the particular incident in question. Where it appears likely that the incident may be the subject of a criminal prosecution, investigation should be suspended and the inmate should not be questioned until the FBI interviews have been completed. (See Policy Statement 2200.1.)

Ordinarily, an inmate will be given a copy of the incident report by the investigating officer at the beginning of the investigation. If the investigation is delayed for any reason, any employee may deliver the charges to the inmate. The date and time the inmate receives a copy of the Incident Report will be noted. This should be done within eight (8) hours from the time the investigator received his assignment, unless there are exceptional circumstances which prevent it. The investigator should also read the charges to the inmate and obtain his statement concerning the incident, except as provided above. Comment about the inmate's attitude may be included here.

The investigator should then thoroughly investigate the incident. He should talk to witnesses, and summarize their statements. The disposition of evidence should be recorded. Often, he will want to talk to the reporting employee to obtain his report first hand and to clarify any questions the investigator may have. All steps and actions taken should be recorded on the incident report.

Under Comments and Conclusions, the investigator may include his comments on the inmate's prior record and behavior, his analysis of any conflicts between witnesses, and his conclusions of what in fact happened. The inmate does not receive a copy of the investigation. However, should the case ultimately be forwarded to the Institution Discipline Committee, the investigation should be given to the inmate's staff representative for use in presentation on the inmate's behalf.

8. *MINOR DISPOSITIONS.* The Chief Executive Officer of each institution shall delegate to such persons he selects the authority to impose minor dispositions and sanctions for violations of institution rules or regulations. Where the institution has a unit management system, the authority to impose minor dispositions and sanctions shall be delegated to staff members of an

inmate's unit. Minor dispositions and sanctions are those actions imposed for violation of institution rules or regulations other than segregation, withholding or forfeiture of good time, and transfer for disciplinary reasons. While the process by which minor dispositions are imposed is left to the discretion of the Chief Executive Officer of each institution, the following minimum standards will apply throughout the Bureau of Prisons:

(a) Each inmate charged with violating an institution rule or regulation shall be given a written copy of the charge or charges against him within 24 hours of the infraction.

(b) Each inmate so charged will be entitled to a hearing held within 48 hours (excluding weekends and holidays) of the incident to consider the charge brought against him.

(c) The inmate will be entitled to be present at the hearing except during deliberations of the decision maker and where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record.

(d) The inmate will be afforded the opportunity to make a statement and to present documentary evidence in his own behalf.

(e) The inmate will be given a written copy of the decision and disposition. Review of any action taken as a minor disposition will be

pursuant to the Administrative Remedy Procedure, Policy Statement 2001.6A.

(f) Where an alleged violation of institution rules or regulations warrants consideration for other than minor sanction, the charge may be referred to the Institution Discipline Committee for hearing and disposition. Copies of all relevant documents should be forwarded to the Chairman of the Institution Discipline Committee with a brief statement of reasons for the referral along with any recommendation for appropriate disposition should the inmate be found to have committed the act charged.

(g) When charges are to be referred to the Institution Discipline Committee, the inmate shall be advised of the rights afforded at a hearing before the Instiution Discipline Committee. He shall be asked to indicate his choice of staff representative and the names of any witnesses he wishes to be called to testify on his behalf at the hearing. (A sample form that may be used for this purpose is attached to this policy statement. Time limits imposed in this section may be extended for good cause.)

(h) Where the person or persons delegated the authority to impose minor dispositions determines that the inmate is innocent of committing any prohibited act, the inmate's file

shall be expunged of the incident report lodged against him.

9. *INSTITUTION DISCIPLINE COMMITTEE.*

(a) *Composition*: The Chief Executive Officer may appoint as many members to the Institution Discipline Committee as he deems appropriate. No fewer than three members, including the Chairman, must be present at any hearing to constitute a quorum. The Chairman and no less than one member present at the hearing will be of the department head level or higher. The third member of the Committee need not be of department head level. For the purposes of this section, "department head" includes acting department head. This requirement as to the level of staff members and Chairman will not apply to Community Treatment Centers or Camps. In order to insure impartiality, a staff member may not sit as a member of the Institution Discipline Committee if he reported or investigated the incident of rules infraction being considered. Ordinarily a staff member witnessing an incident under consideration should not sit as a member of the Institution Discipline Committee. However, a staff member witnessing an incident may sit as a member of the Institution Discipline Committee where the incident is so widely witnessed that vir-

tually every staff member has witnessed it in whole or part. Likewise, a staff member may not sit as a member of the Institution Discipline Committee if he played any significant part in having the charges referred to the Institution Discipline Committee for consideration. The Chief Executive Officer should appoint members to this Committee who are broadly representative of the primary areas of institutional administration and who are fully knowledgeable of the requirements of this policy statement and of the functions of Inmate Discipline.

(b) *Functions*: The Institution Discipline Committee shall conduct hearings, make findings, and may impose appropriate sanctions on incidents of inmate misconduct referred to it for disposition in accordance with the due process standard as listed below. While this Committee may impose any lesser sanctions available, only this Committee will have the authority to order: (1) an inmate placed in disciplinary segregation, (2) an inmate's good time withheld or forfeited, or (3) an inmate transferred to another institution for disciplinary reasons. This Committee will also conduct reviews of inmates placed in disciplinary segregation in accordance with requirements listed below.

(c) *Procedural Requirements*: An inmate may not be placed in disciplinary segregation, or

have his good time withheld or forfeited, or be transferred to another institution for disciplinary reasons unless there has been a fact-finding hearing before the Institution Discipline Committee in which the following procedures have been satisfied:

(1) An inmate will be given advance written notice of the charge(s) against him no less than 24 hours before his appearance before the Institution Discipline Committee. An inmate may waive in writing this 24 hour notice requirement.

(2) An inmate will be provided the service of a full-time staff member to represent him at the hearing before the Institution Discipline Committee should he so desire. The Chairman shall arrange for the presence of a selected staff representative. If the staff member selected declines or is unavailable because of absence from the institution, the inmate should be given the options of selecting another representative, or in the case of an absent staff member, of waiting a reasonable period for his return, or continuing the hearing without a staff representative. A staff representative should be given adequate time to speak with the inmate and interview requested witnesses where appropriate. While it is expected that

a staff member will have had ample time to prepare prior to the hearing, delays in the hearing to allow for adequate preparation may be ordered by the Chairman of the Institution Discipline Committee.

(3) An inmate will be permitted to have witnesses called and to present documents in his behalf, provided the calling of witnesses or the disclosure of documentary evidence would not jeopardize or threaten institutional security. The Chairman will call those witnesses he deems reasonably available and necessary for an appreciation of the circumstances surrounding the charge. Repetitive witnesses need not be called. Unavailable witnesses may be asked to submit written statements. Reasons for declining to call requested witnesses will be documented in the Committee's report. Witnesses requested by the inmate who are called should be questioned by his staff representative or where staff representation has been waived, by members of the Committee. Inmates who have waived the services of a staff representative may submit questions for requested witnesses in writing to the Committee.

(4) The Institution Discipline Committee will prepare a record of its proceedings which need not be verbatim. This record must be sufficient to document the advisement of inmate rights, the Committee's findings, the Committee's decision, the specific evidence relied on by the Committee, and a brief statement of the reasons for the sanctions imposed. The evidence relied upon for the decision and the reasons for the actions taken should be set out in specific terms unless doing so would jeopardize institutional security. (A sample form that may be used to advise an inmate of his rights at an Institution Discipline Committee hearing is attached to this policy statement.)

(5) An inmate will be permitted to be present throughout the Institution Discipline Committee hearing except during deliberations of the Committee and except where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record. A hearing may be conducted in the absence of an inmate where the inmate refuses to appear and he can not be brought to the hearing without the use of force. When an inmate escapes from

custody, the Institution Discipline Committee will conduct a hearing in the inmate's absence at the institution from which the escape occurred. When an inmate who has had sanctions imposed (such as loss of good time) while absent from custody, returns to custody, he will be advised of his right to have the escape charge brought before the Institution Discipline Committee at the institution where he returned to custody. All the procedural requirements of Institution Discipline Committee hearings will apply to this rehearing except written statements of witnesses not readily available may be liberally used instead of live witnesses. The Institution Discipline Committee, upon rehearing, may dismiss the charge, or may modify but may not increase the sanctions previously imposed in the inmate's absence.

(d) *Dispositions of the Institution Discipline Committee*: The Institution Discipline Committee shall have available a broad range of sanctions and dispositions. These dispositions and sanctions will include the following:

The Institution Discipline Committee may

(1) Dismiss any charge(s) before it where appropriate and shall order the record of charges expunged where the inmate has been determined innocent of the charge(s).

(2) Impose sanctions and dispositions available to the person or persons designated to impose minor dispositions.

(3) Direct that an inmate be placed or retained in disciplinary segregation pursuant to guidelines contained in this policy statement.

(4) Direct that an inmate's good time be withheld. Withholding of good time should be limited to misconduct or offenses; it should not be applied as a universal punishment to all persons in disciplinary segregation status. Withholding shall be limited to the good time creditable for the single month during which the violation occurs. (Some offenses, such as refusal to work at an assignment, may be recurring, and thus may permit consecutive withholding actions.) Withheld good time may be considered for restoration at any time.

(5) Direct that an inmate's good time be forfeited. The good time available for forfeiture is limited to an amount computed by multiplying the number of months served at the time of the offense

for which forfeiture action is taken, by the applicable monthly rate specified in 18 United States Code, Section 4161 (less any previous forfeiture or withholding outstanding), plus extra good time which may have been earned to the date of the offense. All or part of an inmate's accumulated good time may be forfeited. Authority to restore all types of forfeited and withheld good time is delegated to the Institution Discipline Committee of each institution. Forfeited good time may be considered for restoration at any time.

(6) Direct that an inmate be transferred to another institution for disciplinary reasons. Where a present or impending emergency requires immediate action, an inmate may be transferred prior to an Institution Discipline Committee hearing. However, a hearing before the Institution Discipline Committee at the receiving institution must be conducted as soon as practicable under the circumstances to consider the factual basis of the charge of misconduct and the reasons for the emergency transfer. Transfers for disciplinary reasons prior to a hearing before the Institution Discipline Committee are to be used only in emergency situations

and only with the approval of the receiving Regional Director. However, when an inmate is transferred under these circumstances, the sending institution will forward copies of incident reports with completed investigation to the receiving institution for purposes of the hearing before the receiving institution's Institution Discipline Committee. All procedural requirements applicable to Institution Discipline Committee hearings contained in paragraph 9(c) of this policy statement will be utilized, except written statements of unavailable witnesses may be liberally accepted instead of live testimony.

(7) Suspend the execution of any sanction it imposes.

(e) *Criminal Prosecutions*: Where an inmate's misconduct may also be the subject of a criminal prosecution, it is not necessary to await the outcome of the criminal trial before taking the disciplinary action, especially if there is reason to believe there will be a long delay before the trial is held. An inmate under investigation of the FBI or other law enforcement officers for an offense committed in the institution may not be questioned about the charge until the FBI interviews are completed. An inmate who is the subject of criminal prosecution for

institutional violations will not be transferred from the jurisdiction of the trial court without the consent of the appropriate United States Attorney or the Court in which the trial is pending.

10. *APPEALS FROM INSTITUTION DISCIPLINEE COMMITTEE ACTIONS.* At the time the Institution Discipline Committee gives an inmate notice of its decision, the Committee will also advise the inmate that he may appeal the Committee's decision to the Chief Executive Officer. Appeals must be filed no later than thirty (30) days after notice of the decision. This time limit may be extended for good cause shown.

An inmate wishing to appeal any disciplinary action imposed as a result of a hearing before the Institution Discipline Committee must use the procedures and forms provided for by Policy Statement 2001.6A (Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities). The Chief Executive Officer may approve, modify, or reverse any disciplinary action of the Institution Discipline Committee as he deems appropriate. This authority may not be delegated. The Chief Executive Officer may not increase the amount of forfeiture imposed.

An inmate may appeal an adverse decision of the Chief Executive Officer through the appeal procedures contained in Policy Statement 2001.6A to the appropriate Regional Director. Appeals to the Regional Director from adverse decisions from the Chief Executive Officer must be filed no later than thirty (30) days from the date of the Chief Executive Officer's decision.

Additionally, appeals of adverse decision from the Regional Director may be made to the Assistant Director, General Counsel and Review within thirty (30) days of the decision from the Regional Director.

On appeal the following factors will be considered:

(a) Was there substantial compliance with the Policy Statement on Inmate Discipline?

(b) Was the decision of the Institution Discipline Committee based on substantial evidence?

(c) Under the circumstances, was the sanction imposed disproportionate to the offense?

11. *SPECIAL HOUSING UNITS.* Each institution having the need for facilities to house inmates separate from the general population will establish special housing units consisting of two types: Administrative Detention and Disciplinary Segregation. (Some institutions may also have a facility for long-term control unit programs—see Policy Statement 7300.80.) Special Housing Units will be maintained in accordance with the policies and procedures contained in this policy statement.

(a) *Administrative Detention*: Administrative Detention is the status of confinement which

results in a loss of some privileges which the inmate would have if assigned to the general population. Administrative Detention is to be used only where the continued presence of the inmate in general population poses a serious threat to life, property, himself, other inmates, staff members or the security of the institution.

(1) *Placement in Administrative Detention*: An inmate may be placed in Administrative Detention by persons designated by the Chief Executive Officer. These persons may be correctional supervisors, shift supervisors or members of an inmate's unit or team. An inmate may be placed in Administrative Detention for any of the following reasons:

a. Pending a hearing for a violation of institution rules or regulations;
b. Pending an investigation of a possible violation of an institution rule, but where charges have yet to be lodged;
c. Pending investigation or trial for crimes committed in the institution;
d. An inmate requests admission to the Administrative Detention area for his own protection;
e. An inmate in holdover status awaiting transfer; or

f. Pending classification.

A memorandum detailing the reason for placing an inmate in Administrative Detention will be prepared and given to members of the inmate's unit or team, with a copy to the Operations Supervisor of the Administrative Detention unit. A copy of this memorandum will also be given to the inmate provided institutional security is not thereby compromised.

(2) *Review of Inmates Housed in Administrative Detention*: The Chief Executive Officer shall designate such person or persons he deems appropriate to review the status of inmates housed in Administrative Detention. Normally the Operations Supervisor of the Administrative Detention unit or members of the inmate's unit or team should be delegated this authority. Initial placement shall be accomplished by means of a memorandum detailing the reasons for this action. Thereafter, the reviewing authority will review the status of each inmate at least once a week. The reviewing authority will formally review each inmate who spends ten (10) continuous days in Administrative Detention, and thereafter such cases will

be formally reviewed at least every 30 days. The inmate shall appear before the reviewing authority at such formal reviews unless the inmate refuses to appear without the use of force. Administrative Detention is to be used only for short periods of time except where an inmate needs long-term protection. An inmate may be kept in Administrative Detention for long-term protection where the need for such protection is well documented. Inmates shall be released when the reason for their initial placement ceases to exist or where their return to general population would no longer pose a serious threat to themselves, to staff or other inmates or the security of the institution.

(3) *Conditions of Administrative Detention*: The basic level of conditions as described below for Disciplinary Segregation will also apply to Administrative Detention. To the extent possible, inmates housed in Administrative Detention will be afforded the same general privileges given to inmates in general population as is consistent with existing resources available and the security needs of the unit. Unless there are compelling reasons to the contrary, in-

stitutions should provide commissary privileges, reasonable amounts of personal property, and exercise periods exceeding those provided for inmates housed in Disciplinary Segregation. Visiting and correspondence privileges of the general population should be given inmates in Administrative Detention.

(b) *Disciplinary Segregation*: Disciplinary Segregation is the status of confinement of an inmate housed in an individual cell either by himself or with other inmates, separated from the general population, as a result of a hearing before the Institution Discipline Committee in which the inmate has been found to have committed a prohibited act. Inmates housed in Disciplinary Segregation will have significantly fewer privileges than those housed in Administrative Detention. Disciplinary Segregation is to be used only where other available dispositions are inadequate to regulate an inmate's behavior within acceptable limits and where the inmate's presence in the general population poses a serious threat to life, property, to himself, staff or other inmates or the security of the institution.

(1) *Placement in Disciplinary Segregation*: An inmate may be placed in Discipli-

nary Segregation only by direction of the Institution Discipline Committee following a hearing in which the inmate has been found to have committed a serious act of misconduct which warrants this serious sanction. Inmates found to have committed serious acts of misconduct should not be placed in Disciplinary Segregation unless their presence in general population would pose a serious threat to staff or other inmates or to the security of the institution.

(2) *Review of Inmates in Disciplinary Segregation*: Inmates placed in Disciplinary Segregation will be reviewed by the Institution Discipline Committee at least once a week on the record. The Committee will formally review the cases of all inmates who spend ten (10) continuous days in Disciplinary Segregation, and thereafter such cases will be formally reviewed at least every thirty (30) days. The inmate shall appear before the Institution Discipline Committee at such formal reviews unless the inmate refuses to appear without the use of force.

There will be a psychiatric or psychological interview when Disciplinary

Segregation continues beyond thirty (30) days. The interview and report should address the inmate's adjustment to his surroundings and the threat the inmate poses to himself, staff and other inmates. A similar psychiatric or psychological interview and report will be made at subsequent two month intervals should segregation continue for this extended period.

An inmate shall be released from Disciplinary Segregation when he no longer poses a threat to himself, or others or to institutional security and when the Institution Discipline Committee determines that continuation in Disciplinary Segregation is no longer necessary to regulate an inmate's behavior within acceptable limits. The time an inmate spends in Disciplinary Segregation must be proportionate to the offense committed, taking into consideration the inmate's prior conduct, his specific program needs, and other relevant factors.

(3) *Conditions of Disciplinary Segregation*:

(a) Basic living levels of decency and humane treatment must be maintained, regardless of the purpose for which a man has been segregated. Privileges may be added,

for the purpose of reinforcing acceptable behavior, to the living conditions of those whose status is purely involuntary, or whose confinement is long-term. These should not result in excessively time-consuming procedures, or neutralize security or shakedown procedures.

(b) When different levels of living arrangements are effected, because of the difference in purpose of segregation, the differential facilities should be separated physically in ways that materials allowed to one person are not passed to others to whom they are not allowed.

(c) A description of basic living levels follows:

1. *Segregation Conditions*: The quarters used for segregation shall be well ventilated, adequately lighted, appropriately heated and maintained in a sanitary condition at all times. All cells will be equipped with beds. The beds may be securely fastened to the floor or wall of the cell according to the desires and needs of each individual

institution. Strip cells will not be a part of the Segregation Unit. Any strip cells which will be utilized will be a part of the medical facility and under the supervision and control of the medical staff.

2. *Cell Occupancy*: Except in emergencies, the number of inmates confined to each cell or room shall not exceed the number for which the space was designed. Whenever an emergency arises which indicates that excess occupancy may be temporarily needed, an immediate report shall be made to the head of the institution and his approval obtained.

3. *Clothing and Bedding*: All inmates shall be admitted to segregation dressed in normal institution clothing after a thorough search for contraband but without belt and shall be furnished a mattress and bedding. Cloth or paper slippers may be substituted for shoes at the discretion of the Warden. An inmate shall not be segregated without clothing, mattress,

blankets and pillow, except when prescribed by the Medical Officer for medical or psychiatric reasons. If an inmate is so seriously disturbed that he is likely to destroy his clothing or bedding or create a disturbance which would be seriously detrimental to others, the Medical Department shall be notified immediately and a regimen of treatment and control instituted with the concurrence of the Medical Officer.

4. *Food*: As prescribed in existing regulations, segregated inmates shall be fed the normal institution meals on the standard ration and menu of the day for the institution. Disposable utensils may be used when necessary.
5. *Personal Hygiene*: Segregated inmates shall have the opportunity to maintain an acceptable level of personal hygiene, e.g. toilet tissue, wash basin, tooth brushing, eye glasses, etc. When necessary, for reasons of safety or security, a retrievable kit of toilet articles may be

issued. Each segregated inmate should shave and shower at least two (2) times a week, unless these procedures would present an undue security hazard.

6. *Exercise*: Each segregated inmate shall be permitted no less than two (2) hours exercise each week. Exercise should be provided in two (2), one (1) hour periods, but if circumstances require, one-half hour periods are acceptable if the two (2) hour minimum is maintained. This provision must be carried out unless compelling security or safety reasons dictate otherwise and these shall be documented.
7. *Personal Property*: Personal property will ordinarily be impounded.
8. *Reading Material*: Ordinarily, it may be provided on a circulating basis.
9. *Supervision*: In addition to the direct supervision afforded by the unit officer, each segregated inmate shall be seen daily by a member of the Medical Depart-

ment, and one or more other responsible officer(s) designated in the local policy issuance.

10. *Correspondence and Visits*: Social correspondence privileges shall be continued in segregation unless there exist compelling reasons to the contrary. Every effort will be made to notify approved social visitors of any necessary restriction on ordinary visiting procedures so that they may be spared disappointment and unnecessary inconvenience. If ample time for correspondence exists, the burden of this notification may be placed on the inmate. In respect to legal, religious, and PMB matters, the relevant policy statements should be followed.

* * * * *

SAMPLE

U.S. Department of Justice — Attachment A
Bureau of Prisons

NOTICE OF INSTITUTION DISCIPLINE COMMITTEE HEARING

DATE: .....

TO: ..... Reg. No.: .....

ALLEGED VIOLATION: .....

DATE OF OFFENSE: ..... Code No.: .....

You are being referred to the Institution Discipline Committee for the above charge.

The hearing will be held on: ....., at ..... A.M. P.M., at the following location: .....

You are entitled to have a full-time staff member represent you at the hearing. Please indicate below whether you desire to have a staff representative, and if so, his or her name.

I (do) ... (do not) ... wish to have a staff representative.

If so, the staff representative's name is: .....

.....

You will also have the right to call witnesses at the hearing and to present documentary evidence in your behalf; provided, calling your witnesses will not jeopardize institutional safety. Names of witnesses

you wish to call should be listed below. Briefly state what each proposed witness would be able to testify to:

NAME: ..... , Can Testify to: .....

.....

.....

NAME: ..... , Can Testify to: .....

.....

.....

NAME: ..... , Can Testify to: .....

.....

.....

The Chairman of the Institution Discipline Committee will call those witnesses (Staff or Inmate) who are reasonably available, and who are determined by him to be necessary for an appreciation of the circumstances surrounding the charge. Repetitive witnesses need not be called. Unavailable witnesses may be asked to submit written statements.

If additional space is needed, use the reverse side of this form. Date, sign, and return this form to the Chairman of the Institution Discipline Committee.

DATE: ..... SIGNATURE: .....

BP-IS-114
9/74

U.S. Department of Justice
Bureau of Prisons

Attachment B

INMATE RIGHTS AT INSTITUTION DISCIPLINE COMMITTEE HEARING

As an inmate charged with a violation of institution rules or regulations referred to the Institution Discipline Committee for disposition, you have the following rights:

1. The right to have a written copy of the charge(s) against you at least 24 hours prior to appearing before the Institution Discipline Committee;
2. The right to have a full-time member of the staff who is reasonably available to represent you before the Institution Discipline Committee;
3. The right to call witnesses and present documentary evidence in your behalf, provided institutional safety would not be jeopardized;
4. The right to be present throughout the Institution Discipline Committee hearing except during Committee deliberations and except where institutional safety would be jeopardized;
5. The right to be advised of the Institution Discipline Committee's decision, the facts supporting the Committee's decision, except where institutional safety would be jeopardized, and the Committee's disposition in writing; and,
6. The right to appeal the decision of the Institution Discipline Committee by means of the Ad-

ministrative Remedy Procedure to the Chief Executive Officer (Warden) within 30 days of notice of the Committee's decision and disposition.

I hereby acknowledge that I have been advised of the above rights afforded me at an Institution Discipline Committee hearing.

Signed: _____

_____

(Typed or Printed Name)

_____

(Register No.)

_____

(Date)

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